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In The

Supreme Court of the United States

October Term, 1993

CREIGHTON E. MILLER,
Administrator of the Estate of MAURICE J. MOLINE,

vs *Petitioner,*

AMERICAN PRESIDENT LINES, LTD., on its own behalf and as successor in interest to AMERICAN MAIL LINES; MATSON NAVIGATION COMPANY, on its own behalf and as successor in interest to OCEANIC STEAMSHIP COMPANY; PACIFIC ATLANTIC STEAMSHIP COMPANY; ISBRANDTSEN LINES; WESTCOAST SHIPPING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED

I.

IN SETTING ASIDE JURY'S IMPOSITION OF PUNITIVE DAMAGES, DID THE COURT OF APPEALS ERR IN REJECTING SUPREME COURT PRECEDENT AND LONGSTANDING GENERAL MARITIME LAW IN OTHER CIRCUITS IMPOSING PUNITIVE DAMAGES AGAINST SHIPOWNER-EMPLOYERS BY ITS RELIANCE ON A CASE WHERE THE SOLE ISSUE INVOLVED ONLY DEATH ACTION COMPENSATORY DAMAGES?

II.

WHERE PUNITIVE MEASURES WOULD OTHERWISE LIE, DOES THE COURT OF APPEALS DO VIOLENCE TO THE CENTURY-PLUS ALLOWANCE OF PUNITIVE DAMAGES UNDER GENERAL MARITIME LAW BY ITS UNTOWARD DECISION TO SINGULARLY EXCLUDE DECEASED CREWMEMBER EMPLOYEES ARBITRARILY FROM THE PERMISSIVE PROVISION, WHERE THE RESULT CONTRAVENES SETTLED PRECEDENT AND DISRUPTS HARMONY AND UNIFORMITY OF AN APPLICABLE BODY OF ADMIRALTY AND MARITIME LAW?

PARTIES TO THE PROCEEDINGS

Petitioner Creighton E. Miller is the duly appointed administrator of the Estate of Maurice J. Moline, deceased.

The defendants-respondents are shipowners of vessels on which the late Maurice J. Moline sailed as a crewmember at various times throughout his maritime career.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit which, inter alia, vacated the jury's imposition of punitive damages is reported in *Miller* v. *American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993), Rehearing and Rehearing En Banc denied May 10, 1993. A copy of that opinion is included in the Appendix to this Petition (A-1). A copy of the order denying rehearing is also included in the Appendix (A-37).

The opinion of the United States District Court for the Northern District of Ohio, sustaining the jury's imposition of punitive damages is unreported. A copy of the decision is contained in the Appendix (A-38).

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioner seeks review under 28 U.S.C. § 1254(1) of the decision in this cause of the United States Court of Appeals for the Sixth Circuit dated March 23, 1993. Rehearing was denied on May 10, 1993. This petition is filed within 90 days from the date rehearing was denied and is therefore timely under Supreme Court Rule 13.4.

STATUTORY PROVISIONS INVOLVED

This action by the estate of a deceased seaman was brought pursuant to the Jones Act, 46 U.S.C. § 688, *et seq.*, and also under the general maritime law. The Jones Act incorporates by reference the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, *et seq.* The decision under review also referred to the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761.

Relevant portions of those statutes are set forth in the Appendix (A-80, A-81 & A-82).

STATEMENT OF THE CASE

Maurice Moline originally brought this action to recover for injuries resulting from his exposure to asbestos while serving as a member of the crew on respondents' ships during the periods 1944-1951 and 1953-1969. Federal jurisdiction was invoked by reason of Moline's suit for negligence under the Jones Act, 46 U.S.C. § 688, and for unseaworthiness under the general maritime law. When Moline died from mesothelioma in 1989 the administrator of his estate assumed the action (A-3).

Trial of the action was divided into three phases: In Phase I the jury found that Moline sustained an

asbestos related disease and awarded $166,000 in compensatory damages. In Phase II the jury found against shipowners on grounds of negligence and unseaworthiness. In addition, the Phase II jury imposed punitive damages of $50,000 against each of thirteen shipowner-defendants for a total of $650,000 because of the shipowners' longstanding willful and wanton maintenance of asbestos-contaminated, unseaworthy vessels. In Phase III the shipowners' third party claims against various asbestos manufacturers and suppliers were dismissed by the trial court (989 F.2d at 1453, A-2).

In denying respondents' post trial motions to set aside the verdict, the District Court held that "[t]here was an abundance of evidence . . . from which the jury could draw inferences of negligence, unseaworthiness and willfulness" (A-59). The Court of Appeals did not disagree, observing "that asbestos was used extensively on the ships on which Moline worked" and that its presence was "particularly common" in the ships' engine rooms where Moline worked and where asbestos was used for boiler insulation and numerous other purposes (989 F.2d at 1453, A-3).

The Court of Appeals also noted that complaints by seamen and their union representatives about high levels of asbestos dust throughout the ships and even in the food were met with only minimal remedial measures (A-4), and the District Court alluded to "evidence that the ship-owners never warned the seamen of the dangers of asbestos, nor did [they] take any precautions to protect the seamen . . . by . . . supplying protective equipment or requiring the seamen to wear masks against inhaling asbestos fibers" (A-60).

The Court of Appeals, however, vacated the jury's imposition of punitive damages and held that as a matter of law punitive damages could not be imposed

under the general maritime law in a seaman's wrongful death action (A-14).

Despite decisions from this Court and several circuits, including its own (see *infra*), holding that punitive damages may be imposed in a seaman's action against a shipowner-employer under the general maritime law, the Court of Appeals read this Court's recent decision in *Miles* v. *Apex Marine Corp.*, 489 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) as precluding the imposition of punitive damages against a shipowner-employer in a death action under the general maritime law even in the most willful and wanton instances of vessel unseaworthiness. Actually, *Miles* dealt only with compensatory damages and said nothing about punitives.

Petitioner maintains that the challenged decision —

(i) is in conflict with the maritime law of other circuits and other states;

(ii) is an unwarranted extension of this Court's holding in *Miles* and contrary to this Court's holding in *Vaughan* v. *Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); and

(iii) is legally erroneous in lumping together compensatory and punitive damages despite their differing goals of compensation on the one hand and punishment and deterrence on the other.

REASONS FOR GRANTING THE WRIT

I.

A CONFLICT AMONG THE CIRCUITS AND THE STATES

Circuit Conflict. The decision below creates a conflict among the circuits on an important question of maritime law. The decision is in conflict with decisions of the Second[1], Fifth[2], Ninth[3] and Eleventh Circuits[4] and, indeed, overturns prior decisions of the Sixth Circuit itself[5] which uphold the imposition of punitive damages in seamen's cases such as this.

The Court of Appeals' refusal to sustain the jury's imposition of maritime punitive damages here purports to be compelled by *Miles* v. *Apex Marine Corp*, *supra*. The court's reliance on *Miles* was misplaced inasmuch as *Miles* was concerned only with compensatory damages.[6]

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1 *In Re Marine Sulphur Queen*, 460 F.2d 89 (2nd Cir. 1972).

2 *Complaint of Merry Shipping*, 650 F.2d 622 (5th Cir. 1981); *Miles* v. *Melrose*, 882 F.2d 976 (5th Cir. 1989).

3 *Evich* v. *Morris*, 819 F.2d 256 (9th Cir. 1981).

4 *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1085 (11th Cir. 1985).

5 *U.S. Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958; *Complaint of Cambria S.S. Co.*, 505 F.2d 517, 523, n.11 (6th Cir. 1974), *cert. denied*, 429 U.S. 975.

6 Indeed, the Fifth Circuit's decision in *Miles* recognized the propriety of imposing punitive damages in a seaman's wrongful death case "under the general maritime law 'upon a showing of willful and wanton misconduct by the shipowner' in failing to provide a seaworthy vessel." *Miles* v. *Melrose*, 882 F.2d 976, 989 (5th Cir. 1989).

When this Court decided *Miles* it gave no hint that the foregoing was an incorrect statement of law.

State Conflict. Moreover, a conflict now exists in state court decisions of two major maritime jurisdictions applying federal maritime law with respect to whether *Miles* precludes punitive damages in a seaman's general maritime law action. Florida holds that it does, Louisiana that it does not. See *Anderson* v. *Sky Cruises, Inc.* and *Mistich* v. *Pipelines, Inc.*, both *infra*.

II.

AN IMPORTANT, RECURRING AND UNSETTLED QUESTION OF MARITIME LAW

The decision below involves a very important question of maritime law that has not been, but should be, settled by this Court. The demands that maritime law be harmonious and uniform, cf. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), plead for resolution of this fundamental, recurring and now unsettled question.

Three Petitions For Certiorari

The recent *Miles* decision has already spawned two petitions to this Court for writs of certiorari each presenting the identical question for review as raised herein. Those petitions were from decisions of Florida and Louisiana state courts which reached exactly opposite results. Both petitions were denied last term. See *Andersen* v. *Sky Cruises, Ltd., Inc.*, 592 So.2d 756 (Fla. 1 DCA, 1992), *rev. denied*, 601 So.2d 551, *cert. denied*, ___ U.S. ___, 113 S.Ct. 446, 121 L.Ed.2d 374 (1993) and *Mistich* v. *Pipelines, Inc.*, 609 So.2d 921 (La. Ct.App. 1992), *rev. denied*, 613 So.2d 996 (1993), *cert. denied sub nom. Brown & Root Inc.* v. *Mistich*, ___ U.S. ___, 61 L.W. 3850 (1993). This case presents the third petition on the same issue.

In less than one year, therefore, at least three petitions for writs of certiorari have been filed, each presenting the same maritime punitive damage question for review and resolution by this Court. Given the large numbers of seamen's injury actions annually filed and presently pending in both federal and state courts, this issue is bound to arise again and again in subsequent certiorari petitions, before various state and federal trial courts, and before state and federal appellate courts throughout the country until the matter is finally put to rest — as only it can be — by this Court.

As might be expected, the question whether *Miles* precludes punitive damages as a matter of law in seamen's general maritime law actions has already arisen in several other District Court actions. The results have been mixed. For example, see *In re Mardoc*, 768 F. Supp. 595 (E.D. Mich. 1991); *Halton* v. *Lykes Bros. Steamship Co.*, 771 F. Supp. 179 (E.D. TX 1991); *Complaint of Aleutian Enterprises, Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991); *Rollins* v. *Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991), *In re Waterman Steamship Corp.*, 780 F. Supp. 1093 (E.D. La. 1992) holding that *Miles* precludes punitives.

But, in addition to the District Court's decision in this case holding that *Miles* did *not* require the court to "dismantle the longstanding availability of punitive damages in maritime tort claims based on unseaworthiness" (A-54), other District Courts have likewise concluded that punitive damages under the general maritime law are unaffected by *Miles*: *In Re of Garda Marine, Inc.*, 1992 A.M.C. 1307 (S.D. Fla. 1991); *Logue* v. *Tidewater Inc.*, 1992 W.L. 59409 (E.D. La. 1992); *Davis* v. *Penrod Drilling Corp.*, 1991 W.L. 264541 (E.D. La. 1991); *Hannon* v. *Waterman Steamship Corp.*, 1991 W.L. 88012 (E.D. La. 1991); *Duplantis* v. *Texaco, Inc.*, 771 F. Supp. 787 (E.D. La. 1991)

(holding punitives available post-*Miles* in seaman's action against non-employer tortfeasor). *CEH, Inc* v. *FV "SEAFARER"*, 148 F.R.D. 469 (D.R.I. 1993). In a remarkable understatement, the court in *CEH, Inc.* noted accurately that "the confusion over recovery of punitive damages under general maritime law continues." And so it does.[7]

The issue is ripe for resolution by this Court. The admiralty bar, the maritime industry, litigants and lower state and federal courts yearn for a final determination of this perplexing and persisting question. The instant petition squarely presents the legal issue unencumbered by extraneous questions and is therefore an excellent vehicle for resolving presently existing conflicts among the circuits and the states and for restoring harmony and uniformity to the country's general maritime law.

Indeed, the denial by this Court of the two previous petitions for certiorari — one from Florida disallowing punitives on the basis of *Miles*, the other from Louisiana upholding punitives despite *Miles* — have themselves contributed to the lack of harmony and uniformity now extant in maritime law. Those two denials, however, have set the stage for the final resolution of this fundamental question; and the law's twin interests of certainty and judicial economy plead for a prompt and

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[7] Even before *Miles*, Mr. Justice White favored the grant of certiorari to resolve an apparent conflict between the Fifth and Ninth Circuits over the assessment of punitive damages in seamen's cases under the general maritime law. He would have granted certiorari in *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), *cert. denied*, 493 U.S. 871, 110 S.Ct. 200, 107 L.Ed.2d 154 (1989) because he found its punitive damage holding in conflict with that of *Complaint of Merry Shipping*, 650 F.2d 622 (5th Cir. 1981). See *McMongale* v. *Northwest Women's Center, Inc.*, 493 U.S. 901, 902, 110 S.Ct. 261, 107 L.Ed.2d 210.

Since *Miles*, the question is all the more in need of authoritative pronouncement.

authoritative determination. Both of those interests need to be served now by a definitive ruling on the recurring question of whether in *Miles* this Court meant to silently change maritime punitive damage law.

ARGUMENT

A. *Miles* Improperly Extended

In rejecting the longstanding precedents allowing imposing punitives in cases such as this, see *infra*, the Court of Appeals misread *Miles*. *Miles* merely said that when it comes to compensatory damages, a subject addressed by Congress in the Jones Act, the same measure of compensatory damages applies whether the theory of recovery is negligence or unseaworthiness. This Court said nothing in *Miles* about the propriety of punitive damages — damages which are not addressed in the Jones Act and which, in contrast to the compensatory kind, stand on a different footing and serve a different purpose.

Just as this Court had never encountered a "strong case" that ~~might~~ militate to upset punitives in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. ___, 111 S.Ct. 1032, 1041, 113 L.Ed.2d 1 (1991), so it is that no case of that caliber has ever surfaced to overturn nearly 200 years of viable maritime punitive damage law. There are no public policy operatives against punitive damages in actions for unseaworthiness. The Court of Appeals' prohibition is plainly inconsistent with the philosophy behind this Court's across-the-board hospitable attitude toward punitive awards as an effective safety incentive.

In extending the limitations of a compensatory damages case to extinguish availability of punitive measures in this cause, the Court of Appeals obviously failed to

deal with the distinction between compensatory damages on the one hand and punitives on the other. When diverse purposes served by these separate categories of damages are kept in mind, it is clear that *Miles* cannot be tortured into an authority of any kind on the subject of punitive damages, much less does it purport to insulate shipowners as employers from punitives for egregious conduct in respect to their seamen.

By the same token, *Miles* said nothing about the allowance of prejudgment interest under the general maritime law. In *Anglada* v. *Tidewater, Inc.*, 752 F. Supp. 722 (E.D. La. 1990), however, it was argued that, in view of *Miles*, prejudgment interest could no longer be allowed in a seaman's case. *Anglada* held that *Miles* did not change the preexisting law permitting awards of prejudgment interest on general maritime law claims since, like punitive damages, such awards "were recognized under general maritime law long before the birth of the Jones Act."

In the same vein as *Anglada*, the Jones Act did not silently do away with the unseaworthiness remedy any more than it did away with prejudgment interest; nor did it do away with a century-plus of maritime punitive damages.

B. Viewing Punitive Damages in Admiralty

The law of admiralty has long recognized that punitive damages may be imposed as "proper punishment [for] lawless misconduct." *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 4 L.Ed. 456 (1818). Numerous cases have since recognized that punitive damages may be imposed in actions by seamen under the general maritime law to punish shipowners for aggravated, "willful and wanton," misconduct.[8]

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[8] Two are by the Sixth Circuit itself: *United States Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958

(*concluded on page 11*)

In his post-judgment opinion, Chief District Judge Thomas D. Lambros thoroughly reviewed the history and status of punitive damages under the general maritime law and concluded that *Miles* effected no change in the law.

> This court refuses to dismantle the long-standing availability of punitive damages in general maritime tort claims based on unseaworthiness. The *Miles* decision should not be applied beyond its intended parameters.

(A-54).

The Court of Appeals perceives *Miles* as setting a jurisprudential tone, an aura of attitude and trend, and as a demonstration to proselytize the fate of another issue. Clearly though, the punitive issue never surfaced in *Miles*. To give credence to the appellate judges' perception a litmus would be useful — the *a fortiori* test. It is axiomatic that without a nexus, the *a fortiori* tool of logic is inoperable. Since there is no punitive damage issue in the *Miles* case, no synapse occurs.

It is a strain upon the organized mind of the law to reach a conclusion on one issue based on another that is unrelated and foreign. Punitive damages are allied to the issues of punishment and deterrence and are com-

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(*continued from page 10*)

(1970), and *Complaint of Cambria S.S. Co.*, 505 F.2d 517, 523 n.11 (6th Cir. 1974), *cert. denied*, 429 U.S. 975. See also *Self* v. *Great Lakes Dredge and Dock Co.*, 832 F.2d 1540 (11th Cir. 1987); *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), *cert. denied*, 493 U.S. 871; *Complaint of Merry Shipping*, 650 F.2d 622 (5th Cir. 1981), *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir 1973); *Pino* v. *Protection Maritime Ins. Co.*, 490 F. Supp. 277 (D.C. Mass. 1980); *Renner* v. *Rockwell International Corp.*, 403 F. Supp. 849 (D.C. Cal. 1975); *Baptiste* v. *Superior Court*, 106 Cal. App. 3d 87, 164 Cal. Rptr. 789 (1980), *cert. denied*, 101 S.Ct. 940.

pletely foreign to the compensatory issue. *Miles* addresses only the latter and is void of the former. The test fails.

Nevertheless, the Court of Appeals shattered precedent, including its own, by reliance on cases that do not allude to punitive damages and on statutes that address only compensatory, not punitive, damages (A-1 to A-14).

C. Viewing Punitive Damages At Large

Compensatory damages are to make the victim whole. The goal is to provide compensation for losses actually sustained by the victim and to visit the cost upon the tortfeasor whose fault caused the losses in the first place. 22 Am. Jur. 2d, *Damages*, § 23, p. 50. The focus is on the loss to the victim.

Punitive or exemplary damages serve a different purpose: to punish the tortfeasor for the willfulness, wantonness or recklessness of his conduct and to make an example of him in the hope of future deterrence. With punitives, the focus is on "the enormity of [the tortfeasor's] offense rather than the measure of compensation to the plaintiff." *Day* v. *Woodworth*, 13 How. 363, 371, 14 L.Ed. 181 (1852). See also *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. ___, 111 S.Ct. 1032, 1042, 113 L.Ed.2d 1 (1991) and *Molzof* v. *United States*, ___ U.S. ___, 112 S.Ct. 711, 116 L.Ed.2d 732 (1992). Punishment and deterrence are twin ends to be served; punitive damages are the means to those ends. Compensatory damages are "different in kind" from punitive damages. *Molzof*, 112 S.Ct at 716.

Recent decisions by this Court In *Pacific Mutual* and *Molzof* and just recently in *TXO Production Corp.* v. *Alliance Resources Corp.*, ___ U.S. ___, 61 Law Week 4766 (June 25, 1993) have settled the law in this country that punitive damages are a traditional and integral part of

our civil law, especially appropriate in the field tort law as a strong incentive for vigilance and safety. Rather than hostility or even grudging acceptance of the efficacy of punitive damages, this Court's recent decisions demonstrate a hospitable attitude of long-standing. Cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615, 625, 78 L.Ed.2d 443 (1984) ("Punitive damages have long been a part of state tort law."). This Court's acceptance of punitives is bottomed on its assessment that imposing those measures "rationally advances the State's goal," (and here, admiralty's like goal) of deterring misconduct, promoting carefulness and maximizing oversight. *Pacific Mutual*, 111 S.Ct. at 1041.

D. Viewing Punitive Damages in Seamen's Actions

This Court has already dealt with the imposition of punitive damages in a seaman's action. In *Vaughan* v. *Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), the Court affirmed the imposition of damages against a willful and recalcitrant shipowner who deliberately refused to pay a seaman's maintenance and cure. Even in dissent Justice Stewart noted the propriety of imposing punitives if the shipowner's refusal to pay "stemmed from a wanton and intentional disregard of the legal rights of the seaman . . ." *Id.*, 369 U.S. at 540, 82 S.Ct. at 1004. And see *Hines* v. *J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987) and *Robinson* v. *Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973), both relying on *Vaughan* and upholding punitive damages for a shipowner's unjustified failure to provide maintenance and cure. An admiralty court also inflicted punitive damages where seamen were "blacklisted." *Pino* v. *Protection Maritime Ins. Co.*, 490 F. Supp. 277 (D. C. Mass. 1980).

Does the Court of Appeals mean to say that *Miles* also silently overrules *Vaughan*? Or if *Vaughan* remains

intact, does the court mean to create further disharmony by allowing punitives to remain viable after *Miles* for one general maritime law remedy but not for another — for failure to pay maintenance and cure, but not for aggravated breach of the warranty of seaworthiness? See *Ridenour* v. *Holland American Line Westours, Inc.*, 806 F. Supp. 910 (W.D. Wash. 1992) rejecting defendant's contention that *Miles* dictated dismissal of seaman's punitive damage claim for shipowner's willful failure to pay maintenance and cure.

By seeming to preclude punitives only in seamen's death cases while leaving them intact in seamen's injury cases, the Court of Appeals has committed the very transgression eschewed by this Court in *Moragne* v. *States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). The Court said:

> These statutes [e.g. Jones act and DOHSA], taken together, indicate that there is a general congressional policy disfavoring awards of punitive damages in *maritime wrongful death actions*.

Miller, 989 F.2d at 1457 (emphasis added) (A-11). In point of fact, the statutes are utterly silent on the subject of punitive damages in either death actions *or* non-fatal injury actions.

The court has thus produced "a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne* at 405. Consistent with admiralty's goal of harmony and uniformity, cf. *Southern Pacific Co* v. *Jensen*, *supra*, *Moragne* sought to put such incongruities to rest.

The challenged decision, however, has produced just the opposite of *Moragne's* aspiration: by failing to differentiate between the goals of compensatory and punitive

damages, the Court has created a rule which produces the same result for breaches of *different* duties in situations that *can* be differentiated in policy.

E. Viewing Punitive Damages for Unseaworthiness

The Jones Act, 46 USC § 688, *et seq.*, was enacted in 1920. By incorporating the Federal Employers Liability Act, 45 USC § 51, *et seq.*, the Jones Act extended to seamen a right enjoyed by railway workers to recover for injuries caused by their employer's negligence.

When the Jones Act was passed in 1920, maritime law had recognized the propriety of punitive damages for over 100 years. *The Amiable Nancy*, *supra*. Moreover, by 1920 the maritime law had long afforded seamen the right to sue for injuries caused by unseaworthiness; they could also recover maintenance and cure. *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903). The Jones Act did not purport to change these well-recognized features of maritime law. The Act's purpose was to *extend* a remedy to seamen, not detract from their existing remedies. By granting a negligence action and the right to a jury trial, the Jones Act did not do away with preexisting remedies for unseaworthiness or for maintenance and cure. T. Schoenbaum, *Admiralty and Maritime Law*, Hornbook Series, 2d Ed., § 5.5, p. 173 (West 1987); *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963). "Nor do we read the Jones Act as sweeping aside general maritime law remedies." *American Export Lines,Inc.* v. *Alvez*, 446 U.S. 274, 282, 100 S.Ct. 1643, 1648, 64 L.Ed.2d 284 (1980). *Miles* makes the same point, stating that the Jones Act "evinces no general hostility" to the general maritime law, 111 S.Ct. at 324.

The doctrines of seaworthiness, maintenance and cure, and the long-recognized assessment of punitive

damages were well ensconced in maritime law prior to, and continued unaffected by, enactment of the Jones Act. After passage of the Act a substantial body of case law recognizes the propriety of punitive damages under the general maritime law.

A leading case recognizing the propriety of maritime punitive damage law prior to the instant decision is by the Sixth Circuit itself: *United States Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), recognizes that in seamen's actions punitive damages may be imposed to punish a reckless shipowner. Also, *Complaint of Cambria S.S. Co.*, 505 F.2d 517, 523 n. 11 (6th Cir.1974), *cert. denied*, 429 U.S. 975, another Sixth Circuit seaman's case, recognizes assessment of punitive damages under the general maritime law where willful and wanton conduct is shown.

See also *Complaint of Merry Shipping*, 650 F.2d 622 (5th Cir. 1981) upholding punitive damages in a seaman's action:

> Punitive damages should be available when a shipowner has willfully violated the duty to furnish and maintain a seaworthy vessel. The shipowner's duty stems from the recognition of 'the hazards of marine service which unseaworthiness places on the men who perform it . . . and their helplessness to ward off such perils.' *Punitive damages would serve to deter and punish owners whose reckless acts increase these hazards.* (Emphasis added.)

Id., 650 F.2d at 625.

To the same effect, in reliance on *Merry Shipping*, is *Self* v. *Great Lakes Dredge and Dock Co.*, 832 F.2d 1540 (11th Cir. 1987). There, the court reversed *for the imposition* of punitive damages in a case where the owner's

known safety violations rendered the vessel unseaworthy:

> Punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship, . . . or where the shipowner's acts (or failures to act) recklessly increased the danger of disaster.

Self, supra, 832 F.2d at 1550.

F. Uniformity Of Maritime Law Impaired

If the challenged decision carries the day, only in actions by seamen, ordinarily favored as "ward[s] of the admiralty",[9] would shipowners' willful and wanton misconduct go unpunished. Punitives would remain for infliction in egregious cases unaffected by the Jones Act, such as in longshoremen's suits, *cf.*, *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974); in suits by injured passengers, *cf.*, *Muratore* v. *M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988); in suits by harbor workers; and, for that matter, in actions by anyone other than a Jones Act seaman. See S. G. Flynn, *Punitive Damages after Haslip & Miles* v. *Apex Marine: Allowable for Everyone But Seamen?*, Vol 5, Univ. of San Francisco Maritime Law Journal, p. 155 (1992): "The extension of the *Miles* rationale to prohibit punitive damages for a seaman's injury or death under the general maritime law is unsound." *Id.*, at 169.

Under the Court of Appeals' holding, aggravated misconduct toward admiralty's wards would go unpunished and undeterred while such civil punishment would remain in cases involving those traditionally less favored by maritime law. That notion is incompatible

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9 *Garrett* v. *Moore McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 84 L.Ed. 239 (1942).

with the solicitous regard in which the maritime law holds seamen, and with the "settled canon of maritime jurisprudence," in seamen's actions, *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 281, 100 S.Ct. 1672, 1677, 64 L.Ed.2d 284 (1980), that if matters are in doubt, "'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy . . .'" Citing *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 287, 90 S.Ct. 1772, 1781, 26 L.Ed.2d 339 (1970).

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CONCLUSION

The Court of Appeals' decision strikes the death knell for seaman general maritime law punitive damages by its rejection of longstanding maritime jurisprudence without semblance of appropriate legal authority. In causing the existing circuit and state conflict by concluding that *Miles* interred punitive damages in actions by seamen under the general maritime law, the court (1) violated *stare decisis*; (2) ignored the difference in purpose between compensatory damages and punitives; (3) failed to appreciate the historical development of maritime law under which punitive damages and the unseaworthiness remedy both existed before the Jones Act and, in matters relevant to this case, were unaffected by that Act; and (4) failed to appreciate that uniformity in the application of maritime law will be substantially impaired, not promoted, by the court's decision.

Petitioner prays that the petition be granted (i) to resolve the substantial conflict now existing in the circuits and the states and (ii) to resolve the important, unsettled question of federal maritime law presented herein.

Respectfully submitted,

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Dated: August 6, 1993

APPENDIX TO PETITION FOR CERTIORARI

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OPINION

(CITE AS 989 F.2d 1450 (6TH CIR. 1993)

(United States Court of Appeals — Sixth Circuit)

(Argued June 11, 1992; Decided March 23, 1993; Rehearing and Rehearing En Banc Denied May 10, 1993)

(Creighton E. MILLER, Administrator of the Estate of Maurice J. Moline, Plaintiff-Appellee, v. AMERICAN PRESIDENT LINES, LTD., on its own behalf and as successor in interest to American Mail Lines; Matson Navigation Company, Inc., on its own behalf and as successor in interest to the Oceanic Steamship Company; Pacific Atlantic Steamship Company; Isbrandtsen Lines; West Coast Shipping Company, Defendants-Appellants, Foster Wheeler Corporation; General Electric Company; T&N, PLC; Westinghouse Electric Corporation; Owens-Corning Fiberglas Corporation; Keene Corporation; Owens-Illinois, Inc., Defendants-Appellees – Nos. 91-3602, 91-3837)

Before: MERRITT, Chief Judge; MILBURN, Circuit Judge; and PECK, Senior Circuit Judge.

MERRITT, Chief Judge.

This is an asbestos case, an appeal from a judgment, following a jury verdict, holding defendant shipowners liable for the wrongful death of a seaman on theories of negligence and unseaworthiness, and from the dismissal of defendant shipowners' third party claims for indemnity and contribution from certain asbestos suppliers and manufacturers.

The case is one of twenty seaman's cases drawn from the Maritime Asbestos Docket to go to trial in the Northern District of Ohio on an accelerated schedule. The

trial was divided into three phases: Phase I considered whether the plaintiff suffered an asbestos related disease and, if so, the amount of compensatory damages; Phase II dealt with liability and punitive damages; Phase III considered the shipowners' claims for indemnity and contribution against asbestos manufacturers and suppliers. The Phase I jury found that the plaintiff suffered from an asbestos related disease, and was due $166,000 in compensatory damages. The Phase II jury found the shipowners liable for the compensatory damages under negligence and unseaworthiness, and imposed punitive damages of $50,000 against each defendant for a total amount of punitive damages of $650,000. In Phase III, the District Court dismissed the shipowners' third party claims against the asbestos manufacturers and suppliers.

Defendant shipowners challenge the award of punitive damages; the denial of indemnification or contribution; the sufficiency of the evidence on the element of causation; the admission of testimony by certain of plaintiff's witnesses of whom the defendants had little notice; and the District Court's handling of a jury request for a written copy of the jury instructions. We conclude that punitive damages are not available in this case, and that the issue of indemnity and contribution should be analyzed in terms of comparative fault rather than under the active-passive negligence doctrine applied by the District Court. On all other issues we affirm the judgment of the District Court.

I.
FACTS

This action was originally brought by Maurice Moline, a retired seaman, based upon his exposure to asbestos and other toxic chemicals as a crew member on defendants' ships. He alleged negligence under the Jones Act,

46 U.S.C.App. § 688, and unseaworthiness under general maritime law. Upon his death in 1989, the action was assumed by his personal representative.

Moline was employed on defendants' ships from 1944-1951 and from 1953-1969. A number of witnesses testified that asbestos was used extensively on the ships on which Moline worked. It was used as insulation in the engine rooms, on ventilation ducts, and on steam pipes running through crews' quarters. The pounding of the ships on the ocean and the normal deterioration of this insulation created asbestos dust everywhere the insulation was used. Crew members asleep in their quarters would wake to find themselves coated with a thin layer of asbestos dust, and in times of bad weather the crew was forced to cover kitchen pots to keep them from being covered in asbestos dust. Asbestos was used in gaskets, as packing on ship valves, in fire brick mortar, in refrigeration units, in floor and ceiling tiles, as insulation cement, as spackling and joint cement, and in winches.

Moline performed a variety of jobs on board defendants' ships, including those of maintenance reefer, oiler, electrician and wiper. His jobs were all connected with the engine room and all involved work with asbestos. Asbestos was particularly common in the engine room where it was used on boilers to insulate and to prevent leaks. Asbestos blankets, boards and gloves were used to facilitate work on hot engine parts. Moline's work as an electrician required him to remove asbestos insulation to reach hidden wires and junction boxes. This was done with a hacksaw or other tool, and caused a good deal of asbestos dust. When replacing or repairing asbestos insulation, crew members would take asbestos powder from bags or cans, scooping it out by hand or with a coffee can, and mix the powder with water to

make a bonding compound. As a wiper, Moline's job was to clean up after electricians and engine room workers.

Individual seamen and their union representatives made complaints about the high levels of asbestos dust, but remedial measures were minimal. They filed grievances about the presence of asbestos in the food and about seamen having to handle the substance. Complaints by union representatives about the prevalence of asbestos dust in the air sometimes resulted in efforts to clean out vents with shop vacuums, but more often were ignored. Whether defendants knew or should have known of the dangers of asbestos exposure at the time of these complaints is unclear.

The trial testimony did, however, make clear to the jury the dangers of extensive asbestos exposure. Expert testimony indicated that seamen faced risks of asbestos related disease comparable to insulation workers. Although all crew members were exposed to asbestos, the most dangerous area was the engine room. There was also medical testimony that exposure to asbestos can cause scarring of the lungs or lung lining. It is undisputed that Moline died of mesothelioma, an asbestos related disease which can arise from a relatively brief exposure to asbestos.

II.
AVAILABILITY OF PUNITIVE DAMAGES

Defendant shipowners first challenge the award of punitive damages, arguing that punitive damages are not available as a matter of law in a wrongful death action brought under the Jones Act and general maritime law. Defendants rely primarily upon a recent Supreme Court case, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), which held that certain nonpecuniary damages are not available in a

wrongful death action brought under the Jones Act and general maritime law. The specific issue in *Miles* was whether the unavailability under the Jones Act of damages for loss of society and lost future income precludes recovery of these damages under a general maritime law unseaworthiness claim. The Court found that it does.

The district court declined to apply *Miles*, holding that because the Supreme Court did not address the specific question of punitive damages, *Miles* was not controlling. The district court refused, therefore, to "dismantle the longstanding availability of punitive damages in general maritime tort claims based on unseaworthiness" by extending *Miles*. For many years prior to *Miles*, punitive damages had been recognized as an appropriate remedy under general maritime law. *See The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 4 L.Ed. 456 (1818); *Protectus Alpha Navigation Co.* v. *North Pacific Grain Growers*, 767 F.2d 1379, 1385 (9th Cir. 1985); *United States Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (6th Cir. 1969). The Fifth Circuit has specifically held that punitive damages are available in a general maritime law unseaworthiness action for the wrongful death of a seaman. *In re Merry Shipping Inc.*, 650 F.2d 622, 626 (5th Cir. Unit B 1981).

The *Miles* decision is not, however, so easily dismissed because its reasoning, if not its holding, seems to cover the type of damages before us. Nonpecuniary damages also had a long history of acceptance in general maritime law before *Miles* held them unavailable in a seaman's wrongful death action. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 589-90 n. 25, 94 S.Ct. 806, 817 n. 25, 39 L.Ed.2d 9 (1974). *Miles* addressed the same general question before this court, "the preclusive effect of the Jones Act for deaths of true seamen." *Miles*, 498 U.S. at 32, 111 S.Ct. at 325. The question before us is whether the unavailability of punitive damages under the Jones Act precludes

recovery of punitive damages under a general maritime law unseaworthiness claim for the wrongful death of a seaman. Our analysis of this question must be guided by the reasoning of the Supreme Court in *Miles*.

The *Miles* analysis begins with an evaluation of the historical development of the maritime wrongful death action. Prior to the passage of the Death on the High Seas Act and the Jones Act, there was no maritime wrongful death action under federal statutory law or general maritime law. *See Moragne* v. *States Marine Lines*, 398 U.S. 375, 393-94, 90 S.Ct. 1772, 1783-84, 26 L.Ed.2d 339 (1970). An injured sailor could bring an action for unseaworthiness or negligence, but his survivors had no remedy if he were killed. In 1920, Congress sought to remedy this situation by passing the Death on the High Seas Act and the Jones Act. The Death on the High Seas Act provided wrongful death actions in unseaworthiness and negligence to anyone killed more than three miles from shore.[1] The Jones Act provided seamen a wrongful death action in negligence.[2]

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[1] **46 U.S.C.App. § 761 reads in part:**

> **Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.**

[2] **46 U.S.C.App. § 688 reads in part:**

> **[I]n case of the death of any seaman as a result of any [personal injury in the course of employment] the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.**

Nonseamen killed in state territorial waters were left to rely upon state wrongful death statutes.

In 1970, the Supreme Court supplemented these remedies by creating a general maritime law cause of action for wrongful death. *Moragne*, 398 U.S. 375, 90 S.Ct. 1772. *Moragne* involved a longshoreman killed in Florida territorial waters. His death was found to be the result of the unseaworthiness of the ship, but not of negligence. Because he was not a seaman he had no Jones Act claim, and because he was killed in state territorial waters the Death on the High Seas Act did not apply. The Florida wrongful death statute did not provide for an unseaworthiness action, so the plaintiff was left without a remedy.

The Court found that this result could not have been anticipated by Congress and was contrary to the intent of the Jones Act and the Death on the High Seas Act. At the time the Acts were passed, unseaworthiness was an obscure and little used cause of action. *Miles*, 498 U.S. at 25, 111 S.Ct. at 322. It became the primary source of recovery years later when the Supreme Court transformed unseaworthiness into a strict liability cause of action in *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944). *Miles*, 498 U.S. at 25, 111 S.Ct. at 322.

The change in the law of unseaworthiness emphasized certain inconsistencies in maritime wrongful death law:

> First, in territorial waters, general maritime law allowed a remedy for unseaworthiness resulting in injury, but not for death. Second, DOHSA allowed a remedy for death resulting from unseaworthiness on the high seas, but general maritime law did not allow such recovery for a

> similar death in territorial waters. Finally, in what *Moragne* called the "strangest" anomaly, in those States whose statutes allowed a claim for wrongful death resulting from unseaworthiness, recovery was available for the death of a longshoreman due to unseaworthiness, but not for the death of a Jones Act seaman.

Id. The *Moragne* court found that these inconsistencies could not have been anticipated by Congress, *id.*, and were contrary to the intent of Congress that the Jones Act contribute to "uniformity in the exercise of admiralty jurisdiction." *Moragne*, 398 U.S. at 401, 90 S.Ct. at 1788 (quoting *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 155, 85 S.Ct. 308, 312, 13 L.Ed.2d 199 (1964)). Further, the Court found that nothing in the Act or its legislative history showed any intent to foreclose nonstatutory federal remedies that might effectuate Congress' original intent. *Id.* 398 U.S. at 400, 90 S.Ct. at 1787.

Having found no affirmative congressional intent to preempt a general maritime law action for wrongful death, the Court examined the justification for the common law rule against recovery for wrongful death in admiralty cases. The Court found that the rule was an anomaly based upon the old English rule of felony-merger, and that it had never had a strong basis in the law of the United States. *Id.* at 384-86, 90 S.Ct. at 1779-80. The Court then looked at Congress' provision of wrongful death remedies under the Federal Employers' Liability Act, the Jones Act, the Death on the High Seas Act, and the Federal Torts Claims Act, and concluded that "there is no present public policy against allowing recovery for wrongful death." *Id.* at 390, 90 S.Ct. at 1782. These enactments were to be given their "appropriate weight not only in matters of statutory construction but also in those of decisional law." *Id.* at 391, 90 S.Ct. at

1782. The Court therefore approved a general maritime law wrongful death cause of action for unseaworthiness.

The details of this new cause of action were to be worked out through future litigation. *Id.* at 408, 90 S.Ct. at 1791. The Court contemplated that federal maritime wrongful death statutes would play an important role in this development. For example, in applying the doctrine of laches courts could look to the Death on the High Seas Act limitations period, "just as they have always looked for analogy to appropriate state or foreign statutes." *Id.* at 406, 90 S.Ct. at 1791. Of particular relevance to the present inquiry is the Court's statement that in deciding subsidiary issues "such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance" in the Death on the High Seas Act and state wrongful death acts. *Id.* at 408, 90 S.Ct. at 1791.

Following *Moragne*, the *Miles* court addressed the question of the availability of certain forms of nonpecuniary damages by looking to the federal maritime wrongful death statutes for guidance. Of primary importance were the Jones Act, *Miles*, 498 U.S. at 36, 111 S.Ct. at 328 ("Because this case involves the death of a seaman, we must look to the Jones Act."), and the Death on the High Seas Act. *Id.* at 29, 111 S.Ct. at 324 (characterizing the *Moragne* action as an "extension of the DOHSA wrongful death action to territorial waters"). The *Miles* court was especially sensitive to the limits set by these statutes, explaining that the statutes could be supplemented in order to further "uniform vindication" of statutory policies, but that the Court must "keep strictly within the limits imposed by Congress." *Id.* at 27, 111 S.Ct. at 323. In the Death on the High Seas Act and the Jones Act, Congress had limited recovery to pecuniary losses. *Id.* at 31, 111 S.Ct. at 325. Because the

plaintiff was a seaman, the Court relied primarily upon the Jones Act, holding that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32, 111 S.Ct. at 326. The decision was also based upon the Court's desire to "restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id.*

Under *Miles*, then, the goal of this court is to articulate a uniform rule regarding the availability of punitive damages in all actions for the wrongful death of a seaman. We are to be guided primarily by the congressionally enacted plan of maritime tort law. *Id.* at 27-28, 111 S.Ct. at 323. The centerpieces of this plan are the Jones Act and the Death on the High Seas Act. The Jones Act incorporates the substantive recovery provisions of the Federal Employers' Liability Act, including the judicial gloss. *Id.* at 31-32, 111 S.Ct. at 325. It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers' Liability Act. *See Kozar* v. *Chesapeake and Ohio Ry.*, 449 F.2d 1238, 1240-43 (6th Cir. 1971). Punitive damages are not therefore recoverable under the Jones Act. *Kopczynski* v. *The Jacqueline*, 742 F.2d 555, 560-61 (9th Cir. 1984); *cf. Miles*, 498 U.S. at 32, 111 S.Ct. at 325 ("Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well."). The Death on the High Seas Act explicitly limits recovery to pecuniary losses, and does not provide for punitive damages. *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987).

Moragne relied upon four federal statutes in concluding that there was no present public policy against allowing recovery for wrongful death: the Federal Employers' Liability Act, the Jones Act, the Death on the High Seas Act, and the Federal Tort Claims Act. *Moragne*, 398 U.S. at 390, 90 S.Ct. at 1782. As shown above, the first three of these statutes do not allow recovery for punitive damages. The Federal Tort Claims Act also explicitly excludes punitive damages. 28 U.S.C. § 2674. Another relevant statute, enacted after the *Moragne* decision, is the Longshore and Harbor Worker's Compensation Act. 33 U.S.C. §§ 901-950. This statute creates a worker's compensation scheme for certain maritime workers which is exclusive of other remedies and does not provide for punitive damages. If it had been in force at the time of the *Moragne* decision, the *Moragne* plaintiff would have been foreclosed by the statute from bringing a general maritime law cause of action. *Miles*, 498 U.S. at 27-28, 111 S.Ct. at 323. These statutes, taken together, indicate that there is a general congressional policy disfavoring awards of punitive damages in maritime wrongful death actions.

Allowing punitive damages would create two major inconsistencies in federal maritime wrongful death law. First, punitive damages would be available for some deaths occurring in territorial waters but not for deaths occurring on the high seas.[3] Second, punitive damages would be available for seamen's deaths occurring in territorial waters due to unseaworthiness but not for those due to negligence.[4] The *Moragne* action was created to

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[3] **The Death on the High Seas Act directly addresses the question of the availability of punitive damages in an action for wrongful death on the high seas, precluding recovery under general maritime law. *Cf. Mobile Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978).**

[4] **The Jones Act directly addresses the question of the availability of punitive damages in a negligence action for the wrongful death of a seaman, precluding recovery under general maritime law. *Cf. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581.**

remedy similar anomalies, and no court should reintroduce inconsistencies into federal maritime wrongful death law without strong policy reasons. *See Moragne*, 398 U.S. at 405, 90 S.Ct. at 1790 (arguing that public faith in the judiciary would be enhanced by the Court's decision to reject a rule which "produces different results for breaches of duty in situations that cannot be differentiated in policy"). To permit recovery of punitive damages in this case would only serve to irrigate what has been called the "Serbonian bog that is the law relating to a seaman's recovery for death and injury."[5]

While we recognize that punitive damages have long been available under general maritime law, and that "admiralty courts have always shown a special solicitude for the welfare of seamen and their families," *Miles*, 498 U.S. at 36, 111 S.Ct. at 327, we are bound by the reasoning of *Miles*. "We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Id.*

The only Supreme Court maritime wrongful death case to allow damages beyond those available under the Jones Act and the Death on the High Seas Act is *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). Like *Moragne*, *Gaudet* involved a

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5 *Karvelis* v. *Constellation Lines S.A.*, 806 F.2d 49, 51 (2d Cir. 1986) (quoting John Milton, *Paradise Lost*, Book II, line 592 (1667) ("that Serbonian bog . . . where armies whole have sunk")). The reference is to the marshy Lake Serbonis in Egypt in which, according to the ancient Greek historian Herodotus, whole armies were engulfed. Judge Mulligan was once asked why he would use a term as obscure as "Serbonian bog" in his opinions. He answered, "[nobody knows] what it means, but they know it's not good." Feerick, *Remarks Delivered on the Occasion of the Presentation of the Fordham-Stein Award to the Honorable William Hughes Mulligan*, 59 Fordham L.Rev. 479, 483 (1991).

longshoreman killed in territorial waters. He was not, therefore, covered by the Death on the High Seas Act or the Jones Act. The issue was whether nonpecuniary damages were available under general maritime law when they were not available under the federal statutes. Relying on *Moragne*, the Court held that "the new maritime wrongful-death remedy [must] be guided by the principle of maritime law that 'certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.' " *Gaudet*, 414 U.S. at 583, 94 S.Ct. at 814 (quoting *The Sea Gull*, 21 F.Cas. 909 (C.C.Md. 1865)). Because the Death on the High Seas Act and the Jones Act did not directly apply, the Court held that the longshoreman's widow could recover for the nonpecuniary loss of society.

Although *Gaudet* has never been overruled, its holding has been limited over the years to the point that it is virtually meaningless. The first case to limit *Gaudet* was *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). *Higginbotham* involved a wrongful death action based on negligence, brought under the Death on the High Seas Act and general maritime law. The issue was whether the plaintiff could recover nonpecuniary damages under general maritime law when such damages were not available under the Death on the High Seas Act. The Court recognized that *Gaudet* was "broadly written," and could be read to authorize nonpecuniary damages for wrongful deaths on the high seas. *Id.* at 622-23, 98 S.Ct. at 2013-14. Nevertheless, the Court limited *Gaudet* to coastal waters, *id.* at 623, 98 S.Ct. at 2014, sacrificing uniformity for adherence to congressional policy. The Court held that, "[a]s *Moragne* itself implied, DOHSA should be the courts' primary guide as they refine the nonstatutory

death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." *Id.* at 624, 98 S.Ct. at 2014.

Miles further limited *Gaudet*, holding that it "applies only in territorial waters, and it applies only to longshoremen." *Miles*, 498 U.S. at 31, 111 S.Ct. at 325. In other words, *Gaudet* was strictly limited to its facts. *Murray* v. *Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 130 (5th Cir. 1992). But as *Miles* itself recognized, after the passage of the Longshore and Harbor Workers' Compensation Act, *Gaudet* is no longer applicable on its facts. *Miles*, 498 U.S. at 30 n.1, 111 S.Ct. at 325 n.1. The case has therefore been condemned to a kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled.

Accordingly, we reject the reasoning of *Gaudet*, and follow instead the course set by *Moragne*, *Higginbotham*, and *Miles*. Looking primarily to the federal maritime wrongful death statutes for guidance, we hold that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman.

III.
INDEMNITY AND CONTRIBUTION CLAIMS

We now address the shipowners' claim that the District Court erred in finding that the shipowners were not entitled to indemnity or contribution from the asbestos manufacturers. The District Court, adopting the active-passive negligence theory articulated by the Fourth Circuit in *Vaughn* v. *Farrell Lines, Inc.*, 937 F.2d 953 (4th Cir. 1991), held that because the jury found the shipowners guilty of active negligence under the Jones Act, and awarded punitive damages requiring willful and wanton misconduct under the general maritime law of unseaworthiness, they were not entitled to indemnity.

The District Court also determined that the finding of willful and wanton misconduct was the equivalent of a finding of intentional wrongdoing, so the shipowners were not entitled to a right of contribution from the asbestos manufacturers and other third parties.

The District Court held that an "active" tortfeasor may never obtain indemnification, but that a tortfeasor classified by the court as "passive" may obtain indemnification from an active co-tortfeasor. Applying the active-passive theory to this case, the court dismissed the shipowners' cross-claims for indemnification from the third party asbestos manufacturers and other product manufacturers because the jury found that the shipowners were "guilty of active negligence under the Jones Act and willful, wanton, and reckless misconduct in maintaining an unseaworthy vessel under the general maritime law of unseaworthiness."

The active-passive negligence theory is doctrinally inconsistent with the general system of comparative fault in maritime law and we reject this approach. Instead we adopt a comparative causation approach to apportioning damages between tortfeasors which will satisfy the equitable goals of comparative fault while at the same time providing shipowners and maritime products manufacturers and suppliers with the proper incentives for safety.

A review of the historical roots of indemnity in maritime law reveals a continuing evolutionary process in which new forms of damage apportionment have been adopted to alleviate the harshness of older forms in an ongoing quest to make damage apportionment more closely reflect the relative culpability of each defendant. The active-passive analysis used by the District Court is inconsistent with this evolution.

Indemnity is an all-or-nothing remedy that shifts the entire amount of a loss from one party to the other. The

law has long recognized the right of parties to make contractual agreements to compensate one another for anticipated losses or liability, and thus express contractual indemnity provisions are usually enforced. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 Tul.L.Rev. 1165, 1171 (1981). While a contractual agreement is clear evidence of a right to indemnification, "proof of a promise to reimburse . . . [is] not required." I.G. Palmer, *The Law of Restitution* § 1.5(d) (1978). Indemnity arose as an equitable means of correcting unjust enrichment in cases where, "without the express creation of [an indemnity contract], the liability of one party is seen to be secondary to that of another, giving rise to a right of restitution when he discharges his liability." *Id.* This "restitution indemnity" requires a comparison of the negligence of each tortfeasor. *Gorman* at 1171.

Noncontractual indemnity was recognized in general maritime law to escape the harsh effects of the ancient maritime rule of divided damages. Yeates, Dye and Garcia, *Contribution and Indemnity in Maritime Litigation*, 30 S.Tex.L.Rev. 215, 224 (1989). The divided damages rule, or rule of moiety ('the half of anything'), was an English maritime rule that divided damages equally between two parties when it was felt that both parties were at fault. *Id.* at 217-18. Although originally adopted by American courts as a "more equal distribution of justice" than the common law rule "which, at the time, precluded contribution among joint tortfeasors and permitted the plaintiff to force one of the wrongdoers to bear the entire loss," *id.* at 218, the divided damages rule was harsh when applied to a party that was only slightly at fault in causing a loss. *Id.* at 224. In response, the courts adopted the major-minor fault rule, which later became the active-passive negligence rule, to allow a negligent tortfeasor who was only "passively" negligent to recover indemnity from a tortfeasor whose "active" negligence caused the plaintiff's loss. *Id.*

In *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), the Supreme Court recognized a form of indemnity in maritime law that did not depend on the express provisions of a contract. The Court held that even absent a formal contract or express indemnity agreement, a stevedoring company that agreed to perform all stevedoring operations required by a shipowner was obligated to indemnify the shipowner for damages caused by the stevedore's unsafe stowage of the ship's cargo. Because the shipowner and stevedore had a stevedoring contract, the Court "did not meet the question of a noncontractual right to indemnity." *Id.* at 133, 76 S.Ct. at 237. The Court did, however, note that the equitable question of balancing the "respective responsibilities" of the parties had been discussed elsewhere in terms of "concepts of primary and secondary or active and passive tortious conduct." *Id.*

The Supreme Court dealt the divided damages rule a final blow in *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975). There the Court adopted a comparative fault rule for maritime cases, noting that, "the rule of divided damages has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit." *Id.* at 410, 95 S.Ct. at 1715. The Court held that maritime liability "is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault." *Id.* at 411, 95 S.Ct. at 1716.

While some courts still apply the active-passive negligence doctrine, *see, e.g., Vaughn* v. *Farrell Lines, Inc.*, 937 F.2d 953 (4th Cir. 1991), the introduction of a compara-

tive fault system in maritime law has led many to question the need for the simplified active-passive distinction. In *Loose* v. *Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982), the Fifth Circuit rejected the active-passive negligence doctrine as inequitable in a comparative fault system. The court reasoned that

> comparative fault seeks the same objective [as the active-passive negligence indemnity rule] both more persuasively and more accurately. A comparative fault system . . . apportions fault among joint tortfeasors in accordance with a precise determination, not merely equally or all-or-none.... While the active-passive concept is more equitable than strict nonapportionment, there have never been satisfactory distinctions between the definition of "active" and "passive."

Id. at 501-02. The *Loose* court "emphasize[d] what other courts have said before us: The concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party." *Id.* at 502. *See also, Elk Corporation of Arkansas* v. *Builders Transport, Inc.*, 862 F.2d 663, 666 (8th Cir. 1988) (commenting that the active-passive approach to indemnity "finds little favor" today, and approving of the Fifth Circuit's analysis in *Loose*); D. Owen & J. Moore, *Comparative Negligence in Maritime Personal Injury Cases*, 43 La.L.Rev. 941, 954 (1983) (suggesting the comparative fault approach to indemnity). Apportionment of damages on the basis of comparative fault more nearly approaches the goal of placing the liability for maritime injuries on the party or parties whose acts or omissions really caused the harm than does the rough active-passive indemnity approach. Thus, a party held liable for a mari-

time injury may seek contribution from co-tortfeasors whether it is "actively" or "passively" negligent.

A comparative fault system requires a comparison of the fault of one tortfeasor with the fault of others and assigns a percentage fault to each. These maritime asbestos cases, and other cases where co-tortfeasors' cross-claims may depend on theories of strict products liability, present a conceptual problem in applying comparative fault principles to forms of liability that are commonly understood as "no-fault." While it would seem illogical to compare the liability of a blameworthy party with that of a nonblameworthy party, the terms "fault" and "no-fault" are misleading as descriptions of the basis for liability. It is not conceptually impossible, or even impractical, to compare liability based on negligence with strict products liability under a comparative fault system. We are not comparing "apples and oranges" or "mixing oil and water," the images used by some. *See, e.g., Daly* v. *General Motors Corp.*, 20 Cal.3d 725, 144 Cal.Rptr. 380, 385, 575 P.2d 1162, 1167 (1978).

While negligence is often thought of as "fault-based," this reference can be misleading because "much of the liability imposed for . . . negligently interfering with legally protected interests is liability without moral fault." Keeton, *Prosser and Keeton on Torts* § 75 at 534 (5th ed. (1984)). Similarly, references to strict liability as liability "without fault," ignore the notion of fault that is inherent in the concept of strict liability. *See, e.g.*, M. Shapo, *The Law of Products Liability*, § 22.03[2][a] (1987) (citing *Suter* v. *San Angelo Foundry & Machine Co.*, 81 N.J. 150, 406 A.2d 140, 146-47 (1979)). As Dean Wade has said of strict products liability:

> In the case of products liability, the fault inheres primarily in the nature of the product. The product is "bad" because it is not duly safe . . .

> [S]imply maintaining the bad condition or placing the bad product on the market is enough for liability . . . One does not have to stigmatize conduct as negligent in order to characterize it as fault.

Wade, *Products Liability and Plaintiff's Fault — The Uniform Comparative Fault Act*, 29 Mercer L.Rev. 373, 377 (1978). "[I]t may be questioned whether 'fault,' with its popular connotation of personal guilt and moral blame, and its more or less arbitrary legal meaning, which will vary with the requirements of social conduct imposed by the law, is of any real assistance ... except perhaps as a descriptive term." Keeton, *supra* § 75 at 537.

Courts and jurors are fully capable of weighing the relative responsibility of strictly liable defendants against that of negligent defendants. *National Can Co.* v. *Vinylex Corp.*, 687 F.Supp. 375, 380 (N.D.Ill. 1988). Requiring juries to compare negligence with strict liability under a comparative fault system is not very different from what juries normally do under such a system, particularly in maritime law cases. In *Seas Shipping Co.* v. *Sieracki*, the Supreme Court described the concept of unseaworthiness as "essentially a species of liability without fault." 328 U.S. 85, 94, 66 S.Ct. 872, 877, 90 L.Ed. 1099 (1946). Shortly thereafter, the Court decided in *Pope & Talbot, Inc.* v. *Hawn* that a plaintiff's own negligence should be considered to determine the amount of his recovery in an unseaworthiness action. 346 U.S. 406, 408-409, 74 S.Ct. 202, 204-205, 98 L.Ed. 143 (1953). Since then courts have applied comparative fault to strict liability unseaworthiness claims. *See Chotin Transportation, Inc.* v. *United States*, 819 F.2d 1342, 1354 (6th Cir.) (Milburn, J. concurring in part and dissenting in part) (citing cases), *cert. denied*, 484 U.S. 953, 108 S.Ct. 344, 98 L.Ed.2d 371 (1987). This application appears

to have posed little problem in cases tried by juries. *Daly*, 144 Cal.Rptr. at 388, 575 P.2d at 1170 (citing *Price* v. *Mosler*, 483 F.2d 275, 277-78 (5th Cir. 1973)).

In addition to unseaworthiness claims, comparative fault applies to maritime personal injury actions under the Jones Act, the Death on the High Seas Act, and to longshoremen's suits against vessels under the Longshore and Harbor Workers' Compensation Act. The Death on the High Seas Act, for example, specifically provides that the court "shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly." 46 U.S.C.App. § 766. Refusing to apply comparative fault principles to maritime products liability claims might "balkanize [the] uniformity and generality" that is a hallmark of maritime law. *Lewis* v. *Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983). To allow indemnity only for claims based on strict products liability while all other maritime claims are subject to contribution based on comparative fault would cause seamen to "attempt to escape the comparative fault of the traditional theory of unseaworthiness and label their case (sic) products cases." *Id.* at 1429. This could lead to forum shopping by seamen seeking to obtain recovery under products liability theories without reduction for their own contributory fault. *Id.*

The application of comparative fault to claims against product manufacturers liable on the basis of strict liability should not reduce incentives for safety. Strict liability for unreasonably unsafe products arises when the seller is "engaged in the business of selling such a product," and the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold," even though "the seller has exercised all possible care," and the "user has not bought the product from or entered into any con-

tractual relationship with the seller." Restatement (Second) of Torts § 402A. The policy underlying strict liability is to place the burden of preventing the harm on the party best able to prevent the harm. *See, e.g., East River Steamship Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 106 S.Ct. 2295, 2299, 90 L.Ed.2d 865 (1986). The manufacturer bears the burden of its unsafe products rather than the injured consumers who are said to be "powerless to protect themselves." *Greenman* v. *Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 701, 377 P.2d 897, 901 (1963) (in bank).

The consumer protection effect of strict products liability is not diminished by comparative fault because plaintiffs are still relieved of the burden of proving negligence on the part of the manufacturer and plaintiffs' recovery is reduced only to the extent that their lack of reasonable care contributed to the injury. *Lewis* v. *Timco*, 716 F.2d at 1431 (citing *Daly*, 144 Cal.Rptr. at 386, 575 P.2d at 1168). Furthermore, manufacturers cannot assume that users of defective products will be contributorily negligent, so their incentive to produce a safe product will not be lessened. *Id.* (citing *Daly*, 144 Cal.Rptr. at 387, 575 P.2d at 1169). As the *Daly* and *Lewis* courts noted, the application of comparative fault principles to strict liability may actually provide more protection for consumers by relieving the inequities associated with absolute defenses such as contributory negligence that "provide windfalls to manufacturers." *Id.*

Applying comparative fault principles to strict liability does not abrogate indemnity in all situations. Indemnity is still available in cases where parties have made express contractual indemnification agreements, and in cases of purely vicarious liability. It is also available for a nonnegligent tortfeasor upon whom the law imposes responsibility — under a theory of constructive liability

or imputed fault— from a co-debtor that is guilty of actual fault. *Hardy* v. *Gulf Oil Corp.*, 949 F.2d 826, 833 & n.12 (5th Cir. 1992) (quoting *Marathon Pipe Line Co.* v. *Drilling Rig ROWAN/ODESSA*, 761 F.2d 229, 236 (5th Cir. 1985)). As the *Hardy* court said, "[a]n ordinary defendant . . . is adequately protected under the comparative negligence system. If the jury determines that an ordinary defendant is not negligent, then the defendant does not owe the plaintiff damages and has no need to pursue an indemnity action . . . ." *Id.* at 833.

Other Circuits that have considered the question of the applicability of comparative fault to maritime products liability actions have reached the same conclusion we reach today. *See Pan-Alaska Fisheries, Inc.* v. *Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977); *Lewis* v. *Timco*, 716 F.2d 1425 (5th Cir. 1983). Thus we reverse the ruling of the District Court enforcing an active-passive rule and declining to allow contribution based on comparative fault.

IV.
SUFFICIENCY OF EVIDENCE TO SHOW CAUSATION

Defendants argue on appeal there was insufficient evidence presented at trial to create a jury question regarding causation. They challenge the finding of causation on two bases: first, plaintiff failed to present sufficient evidence regarding the extent of exposure to satisfy the requisite proximate cause standard of tort liability; second, plaintiff failed to establish a causal link between Moline's death and any exposure associated with a particular defendant.

Under the Jones Act, a plaintiff need only show that the defendant's negligence, however slight, contributed in some way toward causing the plaintiff's injuries. *Gosnell* v. *Sea-Land Service, Inc.*, 782 F.2d 464, 467 (4th

Cir. 1986). Plaintiff below also recovered under the general maritime action of unseaworthiness, which carries a higher causation requirement: "A plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness." *Johnson* v. *Offshore Express, Inc.*, 845 F.2d 1347, 1354 (5th Cir.), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 (1988). *See generally 1B Benedict on Admiralty § 28*, at 3-159 to 163 (7th Ed.1991).[6] Since we find the higher standard of causation under unseaworthiness was met, it is unnecessary for us to address the lesser Jones Act requirement.

Defendants unsuccessfully urged below and assert again in their brief on appeal that the proper proximate cause standard for unseaworthiness is a "frequency, regularity, intensity, duration" test. They further assert that the district court recognized a lack of evidence satisfying this test during a conference in chambers concerning the jury charge (Brief of Defendant-Appellants APL and Matson at 23). A closer inspection of the record, however, reveals that Judge Lambros actually determined that such a showing was not required:

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6 A few courts have equated the burden of causation for Jones Act and unseaworthiness claims. *See, e.g., Farnarjian* v. *American Export Isbrandtsen Lines, Inc.*, 474 F.2d 361, 363 (2d Cir. 1973) ("defendant would be liable if its negligence or the unseaworthiness of the vessel was a proximate cause, in whole or in part, of plaintiff's fall"); *Peymann* v. *Perini Corp.*, 507 F.2d 1318, 1324 (1st Cir. 1974) ("the Jones Act expressly imposes liability upon the employer to pay damages for injury or death due in whole or in part to its negligence . . . [b]ut so does the law of unseaworthiness") (citations omitted). We have adopted the majority view. *Daughenbaugh* v. *Bethlehem Steel Corp.*, 891 F.2d 1199, 1207 n. 3 (6th Cir. 1989) (plaintiff's unseaworthiness claim failed under traditional proximate cause analysis, but her Jones Act claim withstood more liberal causation standard unique to Jones Act and FELA.)

> I'll let you argue that frequency, regularity and intensity, but I'm not going to charge it because it will . . . permit them to infer that the judge has suggested that the disease only be caused if there is a frequent exposure, as regular exposure, and intense exposure. And there is no evidence in this case *that that's required.*

Tr. vol. 12 at 1068-69 (emphasis supplied). We affirm the district court's holding that the correct standard for a finding of proximate cause is the "substantial factor" test.

Applying this test to the facts adduced at trial, we must find the evidence sufficient to support the jury's verdict "unless, when viewed in the light of those inferences most favorable to the non-movant, there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable persons could differ." *Monette* v. *AM-7-7 Baking Company, Ltd.*, 929 F.2d 276, 280 (6th Cir. 1991). The record is full of evidence concerning the presence of asbestos dust throughout the ships on which Moline lived and worked for prolonged periods, from the engine rooms where he labored as a wiper, reefer and electrician to the crew's living quarters. Asbestos-lined pipes ran inches from crew members' bunks and blanketed them with dust that vibrated free overnight during rough weather. Crew members complained more than once of asbestos dust in their food. There was sufficient evidence for a reasonable jury to conclude that repeated and heavy exposure to asbestos was not only possible but inescapable.

The shipowners also assert that the testimony of plaintiff's two expert witnesses was insufficient to establish a nexus between any asbestos exposure and the decedent's death. Their argument is based on two premises: first, that in any case involving asbestos-

related disease, the plaintiff must present expert medical testimony to establish the causal relationship between the asbestos exposure and his injury; and second, the evidence plaintiff presented at trial was insufficient to satisfy this standard. They rely especially on two state court decisions, *Money* v. *Manville Corp. Asbestos Disease Compensation Trust Fund*, 596 A.2d 1372 (Del. 1991), and *Sholtis* v. *American Cyanamid Co.*, 238 N.J.Super. 8, 568 A.2d 1196 (Ct.App.Div. 1989). In *Money*, the court expressly held that "to make a prima facie showing with respect to the cause of an asbestos-related disease, a plaintiff must introduce direct competent expert medical testimony that a defendant's asbestos product was a proximate cause of the plaintiff's injury," because "the causal nexus between exposure to an asbestos product . . . and a particular asbestos-related disease is not a matter of common knowledge." *Money*, 596 A.2d at 1377. The *Sholtis* court refrained from setting down an ironclad rule, writing that "[e]xpert proof would usually be required to establish, even inferentially, that the exposures caused or exacerbated plaintiffs' eventual injuries." *Sholtis*, 568 A.2d at 1207 n.16 (emphasis supplied).

We are not persuaded by these authorities. Although we express no opinion on the correctness of the results reached in *Money* and *Sholtis*, we are not prepared to require expert medical testimony to establish causation in every case concerning asbestos-related disease.[7]

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[7] **Our holding is consistent with the decisions of other circuit courts. The Fourth Circuit did not require medical testimony in *Roehling* v. *Nat'l Gypsum Co. Gold Bond Bldg. Products*, 786 F.2d 1225 (4th Cir. 1986), holding that when a plaintiff can establish that she was in a vicinity in which asbestos dust from defendants' products was inhaled, "a jury can reasonably infer therefrom that plaintiff was injured by defendants' products." *Id.* at 1228 (defendant asbestos manufacturers not entitled to summary judgment on basis**

(*concluded on page A-27*)

While we recognize that defendants should not be subjected to open-ended liability based solely on a jury's inexpert speculation concerning proximate cause, we do not believe that the jury in this case was forced to make such an unreasonable conjectural leap to find for the plaintiff. Here the other evidence concerning harmful exposure to asbestos dust was strong, and plaintiff's evidence on causation was bolstered by the probative testimony of two medical expert witnesses at trial. In Phase I of the trial, Dr. Steven Levin testified that seamen faced risks of asbestos-related disease similar to insulation workers, except that their exposure could be as much as triple that of the insulators because of the 24-hour per day nature of their job. This testimony was read to the jury in Phase II. Dr. Howard Ayres, an industrial hygienist, also testified concerning the harmful effects of asbestos dust. We hold that the evidence was sufficient to support the jury's conclusion that the asbestos aboard defendants' ships was a substantial factor in Moline's death.

Plaintiff asserts that defendants' claims of error concerning the sufficiency of the evidence were not preserved for appeal under Rule 50(a), Fed.R.Civ.P. However, at the close of the evidence in this trial, the district court summarily denied the motions for directed verdict:

> THE COURT: Any argument?
>
> MR. HEFFERNAN: Who goes first?

(*continued from page A-26*)

of plaintiff's failure to directly prove exposure to individual manufacturer's products). The Fifth Circuit followed similar reasoning in *Borel* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973) (where plaintiff establishes that he contracted an asbestos-related disease from inhaling asbestos dust and that he was exposed to the products of defendant manufacturers on many occasions, the jury may infer from strong circumstantial evidence that each defendant was the cause in fact of plaintiff's injury).

MR. KRISPIN: Certainly, there will be — your Honor, it's up to the Court's discretion in how the Court wishes to discuss this issue.

THE COURT: I have been in here with all of you two weeks. I heard the evidence. I am satisfied there is sufficient evidence on all of the issues of negligence and unseaworthiness to submit the case to the jury. *And I am going to overrule all the motions, exceptions noted. I have.*

Tr. Vol. 11-A, p. 1030 (emphasis supplied).

As plaintiff admits in his brief, defendants moved for directed verdict three times. On the first two occasions, the district court did not permit argument. At the close of the plaintiff's rebuttal evidence the district court overruled the motions summarily. Judge Lambros apparently considered himself sufficiently apprised of the moving parties' positions. We find that the "particular purpose" of the Rule was served, and that the proceedings below do not bar us from considering defendants' claim on appeal. *See Riverview Investments* v. *Ottawa Community Improv. Corp.*, 899 F.2d 474, 477 (6th Cir.), *cert. denied*, 498 U.S. 855, 111 S.Ct. 151, 112 L.Ed.2d 117 (1990) (judgment notwithstanding the verdict permitted where the trial court had indicated to the parties that the technical requirements of Rule 50 had been met, even though the movants in that case had not renewed their motion at the close of all the evidence; application of the Rule "should be examined in the light of the accomplishment of its particular purpose as well as in the general context of securing a fair trial for all concerned in the quest for truth," quoting *Boynton* v. *TRW, Inc.*, 858 F.2d 1178, 1185 (6th Cir. 1988)).

V.
TRIAL BY AMBUSH

Defendants assert that they were prevented from sufficiently preparing to meet the testimony of plaintiff's witnesses because the identities and subject matter of several of these witnesses were not disclosed prior to trial, in violation of the pretrial procedures instituted by Judge Lambros.[8] They claim that the district court's decision to permit these undisclosed witnesses to testify (over defendants' strenuous objections) amounted to a "trial by ambush" constituting reversible error. They request a new trial.

To support their claim, defendants point out that of the 111 crew members listed by plaintiff as possible witnesses in Phase I of the trial, only two were called, and three other crew members were allowed to testify who did not appear on the list. Furthermore, of the three medical experts on plaintiff's witness list, none were called to testify, and two experts not on the list, Drs. John Burrows and Stephen Levin, were permitted to testify (over defendants' objections). Defendants were not permitted to depose Burrows, and were only allowed to depose Levin the morning before his afternoon testimony. Finally, in Phase II, retired U.S. Coast Guard captain Clarence Hall and industrial hygienist Howard Ayres, M.D., were permitted to testify even though they did not appear on plaintiff's witness list, and defendants assert they were not informed of the subject matter of the testimony in a timely fashion.

We start with the established rule that "the trial judge has broad discretion in the matter of the admis-

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[8] **To facilitate discovery in the multi-party, multi-case MARDOC litigation, Judge Lambros devised a Case Management Plan that utilized Consolidated Discovery Requests ("CDRs") in lieu of standard interrogatories. The witness lists were included in these CDRs.**

sion or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35, 82 S.Ct. 1119, 1122, 8 L.Ed.2d 313 (1962). In particular, this court has held that where a judge has determined that testimony is otherwise admissible, the mere fact that the party seeking its introduction has not fully complied with pretrial orders does not mandate its exclusion:

> The trial judge must be permitted wide latitude in guiding a case through its preparatory stages. His decision as to the extent that pretrial activity should prevent the introduction of otherwise competent and relevant testimony at trial must not be disturbed unless it is demonstrated that he has clearly abused the broad discretion vested in him. . . .

Davis v. *Duplantis*, 448 F.2d 918, 921 (5th Cir. 1971).

Defendants bear a heavy burden in seeking a new trial. Discovery matters "come within the discretion of the trial court and do not amount to reversible error unless there is an abuse of discretion and substantial prejudice." *International Union, UAW* v. *Michigan*, 886 F.2d 766, 771 (6th Cir. 1989). "In order to prevail on his motion for a new trial, plaintiff must show that he was prejudiced and that failure to grant a new trial is inconsistent with substantial justice." *Erskine* v. *Consolidated Rail Corp.*, 814 F.2d 266, 272 (6th Cir. 1987). Applying this standard to the facts in this case, we hold that the district court did not commit reversible error by allowing the witnesses to testify.

This is a bitterly contested lawsuit. In their roles as zealous advocates, counsel for both sides have been uncooperative. While we do not condone the practices engaged in by plaintiff of which defendants complain, we find similar conduct on both sides.

The unnecessarily antagonistic relationship continued throughout Phase II of the trial. Both sides persisted in refusing to identify their witnesses. The following excerpt from court proceedings on May 1, 1991 is illustrative:

> THE COURT: Let's go home.
>
> MR. HEFFERNAN (for defendants): Once again I just want to mention that I have — not only do I not have a report of what this expert is going to say, I don't even know the identity of the expert. Here we are less than 48 hours before his appearance. And so I will claim when he goes on the stand some prejudice. I can't even prepare a counter defense to a witness whose identity I do not know, and not one iota except for what we talked about here today as to what he is going to testify here by hook and jab.
>
> MR. KRISPIN (for plaintiff): Part of my response to Mr. Heffernan, had I been provided those persons within APL who possessed knowledge that this person would testify to, I wouldn't need to bring in an independent witness.
>
> MR. HEFFERNAN: Hook and jab.
>
> THE COURT: Well, it's clear and apparent that what counsel has got to agree upon, and I'm hopeful that it will be the product of this lawsuit, and the previous lawsuit, that you people are going to come up and [ ] agree on a pecking order in the management and putting together [of] these cases. The issue doesn't have to be knocked [sic] down drag out fight.
>
> * * *
>
> MR. KRISPIN: Along that same vein, your Honor, can I get Mr. Heffernan to identify the number

> of and type of witnesses he expects to be calling by Friday a.m.?
>
> THE COURT: Why don't you —
>
> MR. HEFFERNAN: As soon as he gets me the name of the doctor.

Tr. vol. 5 at 225-26. Under the circumstances, it is understandable that Judge Lambros would have minimal sympathy for either side's complaint of a lack of cooperation from opposing counsel.

Furthermore, defendants have failed to demonstrate actual prejudice. As Judge Lambros pointed out shortly before Dr. Ayers took the stand:

> I realize that Dr. Ayers was not on the witness list, and in that regard, there was no opportunity for discovery that is usually associated with persons who are known to give expert testimony, scientific testimony.
>
> Their special training, background and knowledge is the reason for the calling of a witness to address certain issues. Nonetheless, I am mindful that both sides are well aware of the nature of asbestos-related injuries, the dynamics of the litigation process, have an awareness of the science and knowledge that is available in this particular area.
>
> I really don't know where it will seriously hamper the Defense . . . .

Tr. vol. 8 at 563. Our examination of the record reveals no point in the proceedings where defense counsel appeared genuinely surprised or otherwise prejudiced by the tactics of plaintiff's counsel.

Again, we do not condone the tactics of counsel on either side of this case. The Federal Rules of Civil Proce-

dure upon which the pretrial orders of Judge Lambros were based are intended "to make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Brown Badgett, Inc.* v. *Jennings*, 842 F.2d 899, 902 (6th Cir. 1988). However, "[e]very trial judge is charged with the primary responsibility of ensuring that the judicial proceedings over which he presides are carried out with decorum and dispatch and thus has very broad discretion in ordering the day-to-day activities of his court." *CBS, Inc.* v. *Young*, 522 F.2d 234, 241 (6th Cir. 1975). On the record before us, we are unable to find that the district court abused his very broad discretion. We therefore decline to substitute our own judgment for his by remanding the case for a new trial on the grounds of "trial by ambush."

VI.

EX PARTE RESPONSE TO JURY REQUEST

Defendants also assert error in the district court's handling of a written request from the jury. Judge Lambros set out the facts in a post-trial order dated June 25, 1991, and defendants do not challenge his account of the facts. The jury, after receiving the oral charge in open court, retired to consider its verdict. Soon thereafter, they sent a note requesting a written copy of the instructions. The court reporter was out to lunch, but upon her return, she began transcribing the charge. Upon her completion of 14 of the 26 pages, Judge Lambros sent those pages to the jury with a note promising the remaining pages as soon as the entire transcription was done. Before the transcription could be completed, the jury reached its verdict.

Defendants assert that the court erred in not notifying the parties of the inquiry, in responding to the

inquiry, and in not preserving the written inquiry for the record. In support of their position, defendants cite two Supreme Court cases, *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed. 853 (1919), and *Rogers* v. *United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975), neither of which is in point. In each case, the Supreme Court reversed a jury verdict reached after the trial court issued supplementary instructions to the jury in response to their written request. In *Fillippon*, the jury sent a detailed written question to the trial judge concerning contributory negligence, to which the judge responded in equal detail with a supplementary instruction to which the parties had no opportunity to object. In *Rogers*, the jury wrote the judge asking if they might return a verdict of "Guilty as charged with extreme mercy of the Court," to which the judge responded in the affirmative. In each case, the judge gave the jury an added instruction in which the substantive rights of the defendant were directly affected. He did so without giving the parties adequate notice and an opportunity to respond.

In this case, however, the district court merely provided a transcript of the charge delivered earlier in open court. The court wrote in its Order of June 25, 1991:

> No supplementary instructions were given to the jury. The written charge that was provided to the jury did not add to, nor did it interpret, the oral charge presented in open court in the presence of counsel. The written transcript provided to the jury was a verbatim replica of that oral charge. There was no communication from the judge to the jury other than in writing granting their request. The communication was purely administrative and not supplementary . . .

Id., p. 3.

This court has held that "messages from a jury should be answered in open court with an opportunity for counsel to be heard before the court responds," but we have also qualified this rule by stating that "a court's ex parte communication with the jury will not require reversal where substantive rights of parties have not been adversely affected." *Petrycki* v. *Youngstown & Northern Ry. Co.*, 531 F.2d 1363, 1367 (6th Cir. 1976). Defendants have presented no evidence to contradict the district court's findings as presented in its order of June 25, 1991. We find that it was error for the district court to respond to a written request from the jury after it had retired for its deliberations without notice to counsel and without retaining the communication for the record. But the defendants have presented nothing more than speculation concerning any possibility of prejudice to the defendants.

Defendants cite this court's holding in *Standard Alliance Ind.* v. *Black Clawson Co.*, 587 F.2d 813 (6th Cir. 1978), *cert. denied*, 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.2d 396 (1979), that ex parte contact between judge and jury raises a presumption of reversible error, and that under the circumstances of this case, as in *Standard Alliance*, the presumption cannot be rebutted. However, in *Standard Alliance* there was literally no record of the court's ex parte contact through the court's law clerk; "the length and nature of the law clerk's contact with the jury is unknown." *Id.* at 828. Here, the record is not so devoid of information. We have in the record before us the district court's description of precisely what transpired: The jury made a written request for a typed copy of the charge. The judge complied. Defendants' speculative charges of jury confusion are not sufficient.

VII.
CONCLUSION

For the forgoing reasons we VACATE the punitive damages award, and REMAND the case for consideration of defendants' claims for indemnity and contribution. In all other respects we AFFIRM the judgment of the District Court.

ORDER DENYING REHEARING AND REHEARING *EN BANC*

(United States Court of Appeals — Sixth Circuit)

(Filed May 10, 1993)

(CREIGHTON E. MILLER, Administrator of the Estate of MAURICE J. MOLINE, Plaintiff-Appellee, v. AMERICAN PRESIDENT LINES, LTD., ETC., ET AL., Defendants-Appellants, PACIFIC ATLANTIC STEAMSHIP CO., ET AL., Defendants-Appellants, FOSTER WHEELER CORPORATION, ET AL., Defendants-Appellees.)

BEFORE: MERRITT, Chief Judge; MILBURN, Circuit Judge; and PECK, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

ORDER RELATED TO POST-JUDGMENT MATTERS IN THE ACTION OF MAURICE J. MOLINE (C86-821) AND OTHER RELATED ISSUES IN THE MARDOC LITIGATION

(United States District Court —
Northern District of Ohio)

(Filed August 23, 1991)

(IN RE: OHIO ASBESTOS LITIGATION and CREIGHTON E. MILLER, Administrator of the Estate of MAURICE J. MOLINE, Plaintiff, vs. AMERICAN MAIL LINES, et al., Defendants – OAL ORDER NO. 159; THOMAS D. LAMBROS, CHIEF JUDGE)

The Ohio Asbestos Litigation Maritime Docket (MARDOC) began with over 2,000 actions in which plaintiffs alleged asbestos-related personal injuries incurred while serving aboard ships as merchant mariners. This vast body of mass tort litigation requires extensive management of the large number of claims brought by plaintiffs involving a multitude of shipowner defendants and numerous third party boilermakers, asbestos manufacturers and installers, frequently referred to as products manufacturers. All of these cases were assigned to this judge for consolidated and coordinated case processing.

Despite the many settled principles of admiralty law, asbestos litigation created a new vintage of admiralty and maritime type claims presenting unique and significant issues of law. The litigation is especially complicated due to the nature of various third party claims and cross-claims for indemnification and contribution. The determination of the issues presented by these claims are critical to defendant shipowners who seek to pass liability and risk associated with the seamen's claims over to boilermakers, asbestos manufacturers and installers.

The uncertainty surrounding these issues has seriously impeded settlement negotiations. The land-based asbestos-related personal injury actions supervised by this court are resolved primarily through the settlement process. A major stumbling block to the achievement of resolution through settlement in MARDOC has been the conflicting postures of defendant shipowners and third-parties as to the amount of liability, if any, each should bear.

The shipowners believe extensive participation on the part of boilermakers, asbestos manufacturers and installers is necessary to resolve these claims. The third parties believe that their participation in resolving these cases should be of a limited nature. They argue that the primary liability and risk ought to fall upon the shipowners. The third parties contend that the mere fact that their products were installed aboard ships does not establish liability on their part. The third parties argue that the shipowners were equally knowledgeable of the state of the art as it relates to the dangers of asbestos, and note that defendant shipowners frequently employed specialized crews knowledgeable in the application of asbestos. These crews frequently made repairs and alterations in asbestos insulations while on the high seas. The third parties' attitude is that such alterations were so significant that the shipowners could not be said to be without fault for injuries incurred by the seamen.

Notwithstanding the many difficulties posed by this litigation, the maritime asbestos docket is maturing. In 1989, this judge made a critical analysis of the medical allegations asserted in each of 1,666 MARDOC actions by personally reviewing individual plaintiffs' "b-reader" reports. Subsequent to that review, 678 claims were determined to be non-actionable and were dismissed by

MARDOC Order No. 38, issued on May 9, 1989. In several of those cases, plaintiffs' primary assertion was fear of cancer. This court ruled that fear of cancer was not recognized as an independent cause of action, although fear of cancer could be viewed as a separate element of damages if an actual injury or traumatic event sufficient to cause such fear occurred.

Later, given the enormous transactional costs associated with this multifaceted and polycentric litigation, this court advanced the concept that certain medical conditions, consisting of pleural, interstitial or other indicia of asbestos exposure, may not be actionable either substantively or economically. The court concluded that the costs to process such cases may exceed any real benefit. The court recognized that many cases were filed and prosecuted to overcome the potential statute of limitations problems. Prosecuting such actions may be premature given the long latency period and other etiological factors unique to asbestos and other toxic substance diseases. Premature prosecution because of statute of limitations concerns may prejudicially affect one's right to prosecute a subsequently developed and more serious asbestos disease. Premature prosecution of cases also clogs the docket and deprives more seriously injured plaintiffs of a speedy trial.

The court advocated the creation of a prioritized case management system for those cases where the seriousness of the disease compels accelerated judicial action, and included provisions for the establishment of a deferral or registry system. This system would toll all judicial case activity, and any expenditure associated with case processing for those actions in which the disease process is not yet manifest.

Counsel for plaintiffs in MARDOC actions accepted this concept. Subsequently, 1,157 cases were placed in a

suspended/deferral status, administratively dismissed and terminated from the active docket. The removal of the 1,157 cases from the active docket not only reduced transactional costs, but also permitted the parties to direct their resources to the 336 cases prioritized for trial.

The creation of a priority/deferral docket also allowed the judiciary to further consolidate and more systematically manage the docket. With the cooperation of the Sixth Circuit, judges from the Northern District of Ohio and the Eastern District of Michigan accepted designations intended to facilitate the assignment of the 336 prioritized cases for trial.

In the Fall of 1990, prior to the creation of the priority/deferral docket, the cases of Maurice J. Moline (C86-821), Ashton Reeves (C86-2230), Joseph Carbone (C86-2559) and Harry Smith (C86-4601) came on for a consolidated jury trial. The trial was bifurcated into three phases. Phase one would consider the bifurcated issues of medical causation and compensatory damages; phase two would consider the liability of shipowner defendants and punitive damages; and phase three would consider third party and cross-claims.

Phase one lasted 14 trial days and on December 5, 1990, the jury returned verdicts finding that Messrs. Reeves, Carbone and Smith had not suffered injury or disease caused by exposure to asbestos. Accordingly, judgmentw were entered dismissing and terminating those actions. The jury also found from a preponderance of the evidence that asbestos exposure caused injury or disease to Mr. Moline and set compensatory damages at $166,000.00. The Moline case then proceeded to phase two.

In the second phase, consisting of 12 trial days, the jury considered the issues of shipowner liability and punitive damages and returned a verdict on May 10, 1991, in favor of plaintiff and against shipowner defendants: American Mail Lines; American President Lines, Ltd.; Isbrandtsen Lines; Matson Navigation Company, Inc.; Pacific Atlantic Steamship Company; Pacific Far East Company; Pope & Talbot Company; States Lines/States Steamship; States Steamship Company; The Oceanic Steamship Company; Waterman Steamship Corporation; West Coast Shipping Company; and West Coast Steamship Company, jointly and severally, finding Jones Act negligence and unseaworthiness under the General Admiralty and Maritime Law. Additionally, the jury in the second phase of the trial rendered a verdict against each of the 13 defendant shipowners, severally, for punitive damages under the general maritime claims of unseaworthiness in the amount of $50,000,00.

Subsequently, plaintiff and defendant shipowner Waterman Steamship Corporation entered into a stipulated dismissal pursuant to Fed. R. Civ. P. 60(b).

I.

MOTION OF SHIPOWNERS REPRESENTED BY THOMPSON, HINE & FLORY FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Counsel for defendant shipowners represented by Thompson, Hine & Flory filed a pleading styled as a "motion for revision of interlocutory order, in the nature of judgment notwithstanding the verdict." That motion is granted in part and denied in part.

A. *Availability of Punitive Damages*

Shipowners represented by Thompson, Hine & Flory claim they are entitled to a judgment notwithstanding the verdict on the issue of punitive damages, stating that punitive damages are unavailable as a matter of law

in a seaman's unseaworthiness action. That portion of the motion is denied.

Long ago, this court ruled from the bench that, although punitive damages are not available under Jones Act negligence claims, punitive damages are available under the general maritime claim of unseaworthiness. This position was recently adopted by other courts within this circuit. *Wright* v. *Columbia Transportation*, Case No. 3: 89 CV 7452 (N.D. Ohio Feb. 8, 1991); *Anderson* v. *Whittaker Corp.*, 692 F. Supp. 764 (W.D. Mich. 1988), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 804 (6th Cir. 1990).

However, in *In the Matter of the MARDOC Asbestos Case Clusters 1, 2, 5 and 6*, Case No. 91-70468 (E.D. Mich. Mar. 22, 1991), Judges Avern Cohn and Bernard A. Friedman created a split within the Sixth Circuit on this issue. Judges Cohn and Friedman held:

> [I]t seems clear that the court must restrict any damages plaintiff might recover to those which would compensate "pecuniary loss," as this is the limit on recovery under the Jones Act and DOHSA. Because punitive damages serve to punish wrongdoers and to deter those who might follow their example, and not to compensate plaintiff's losses, they are non-pecuniary. If the remedies under general maritime law may be no greater than those under these federal statutes, the court must hold that punitive damages are unavailable to plaintiffs in these asbestosis actions.

The Eastern District of Michigan relied on a recent ruling by the United States Supreme Court in *Miles* v. *Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). In *Miles*, the Supreme Court determined that damages for loss of society and for loss of a seaman's

future earnings (non-pecuniary losses) are not recoverable under general maritime law principles. *Miles* involved an action for wrongful death brought under the Jones Act, the Death on the High Seas Act and under the general maritime law of unseaworthiness. The Supreme Court held that "a general maritime cause of action exists for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society." 111 S.Ct. at 328. The Court further held that "a general maritime action for survival cannot include recovery for decedent's lost future earnings." *Id.*

Miles was predicated upon the limitation of damages to pecuniary loss in both the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761 *et seq.*, and the Jones Act, 46 U.S.C. § 688. While DOHSA explicitly sets forth the scope of allowable damages, the Jones Act does so by virtue of its incorporation of the substantive provisions of the Federal Employers' Liability Act (FELA), as amended, 45 U.S.C. § 51 *et seq. Miles* v. *Apex Marine Corp.*, 111 S.Ct. at 325, 112 L.Ed.2d at 290 (1990). It has been generally held, and this court agrees, that punitive damages are not recoverable in actions brought under the Jones Act or DOHSA. *Wildman* v. *Burlington Northern Railroad Co.*, 825 F.2d 1392 (9th Cir. 1987); *Kozar* v. *Chesapeake and Ohio Railway Co.*, 449 F.2d 1238 (6th Cir. 1971).

Justice O'Connor, writing for the Supreme Court in *Miles*, determined that Congress, in enacting the Jones Act and DOHSA, intended to create a "uniform system of seamen's tort law." 111 S.Ct. at 324. The Court extended the Jones Act's limitation of damages to wrongful death actions arising under the general maritime doctrine of unseaworthiness, reasoning as follows:

> [i]t would be inconsistent with our place in the constitutional scheme were we to sanction more

> expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.

Miles, 111 S.Ct. at 326.

Punitive damages, however, have a long, rich history in admiralty law. Punitive damages have been available under the general maritime laws going back at least as far as *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 4 L.Ed. 456 (1818), involving a maritime trespass. All circuit courts of appeal which have addressed the issue have held that punitive damages are recoverable under general maritime law. *See Muratore* v. *M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988); *Evich* v. *Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914, 108 S.Ct. 261, 98 L.Ed.2d 218 (1987); *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *reh'g denied*, 837 F.2d 1095 (1988), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988); *In re Merry Shipping Co., Inc.*, 650 F.2d 622 (5th Cir. Unit B 1981), *reh'g denied sub. nom Dyer* v. *Merry Shipping Co., Inc.*, 659 F.2d 1079 (1981); *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972), *cert. denied*, 409 U.S. 982, 93 S.Ct. 318, 34 L.Ed.2d 246 (1972); *United States Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958, 90 S.Ct. 2162, 26 L.Ed.2d 542 (1970) (punitive damages are available if the shipowner was reckless in employing an unfit master). Further, several of these circuits have specifically held that punitive damagesd are recoverable in unseaworthiness claims. *Self*, 832 F.2d 1540 (11th Cir. 1987); *Merry Shipping*, 650 F.2d 622 (5th Cir. Unit B 1981); *Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972).

Under Fifth Circuit precedent, punitive damages are available under general maritime law upon a showing of willful and wanton misconduct by a shipowner in the

creation or maintenance of unseaworthy conditions. *In re Merry Shipping Co., Inc.*, 650 F.2d 622, 623 (Fifth Cir. Unit B 1981).

> Under general maritime law, a seaman has a cause of action against the shipowner for injury or death resulting from unseaworthiness. Under the seaworthiness doctrine, a shipowner has a duty to furnish a vessel and equipment reasonably fit for their intended use. This duty is absolute and completely divorced from concepts of negligence.

Id. (footnotes omitted).

> Punitive damages, long established in our legal system, may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. They serve the purpose "of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." Such damages are available not only in suits, based on negligence but also increasingly in other types of cases, including those alleging breach of contract or statutory violations.

Id. at 625 (footnotes omitted).

The Eleventh Circuit, in *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987), agreed, stating that "punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship . . . or where the shipowner's acts (or failures to act) recklessly increased the danger of a disaster." The trial court found negligence on the part of the owners of the "Robert Watt Miller," but failed to make specific findings of fact regarding unseaworthiness and punitive damages. Those

issues were, therefore, remanded to the district court for determination.

Recently, in *Anderson* v. *Whittaker Corp.*, 692 F. Supp. 764, 774 (W.D. Mich. 1988), the Western District of Michigan also recognized the recoverability of punitive damages under general maritime law, "where there has been a showing of conduct that manifests a reckless or callous disregard for the right of others, or that amounts to gross negligence, criminal indifference or actual malice." *Id.* The existence of circumstances giving rise to punitive damages is a question of fact. *Id.*

Reliance upon *Miles* for the proposition that punitive damages may not be recovered in an unseaworthiness claim is inappropriate and a misapplication of that case. The *Miles* court, although restricting recovery to disallow damages for loss of society and future earnings, also stated:

> [t]he Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness, and it does not preclude the recovery for wrongful death due to unseaworthiness created by its companion statute DOHSA.

Miles, 111 S.Ct. at 324, 112 L.Ed.2d at 289. The Court confined its holding to the "narrow question[s] presented" in that case: whether the income the decedent would have earned but for his death is recoverable and whether damages for loss of society are recoverable. *Miles*, 111 S.Ct. at 327, 112 L.Ed.2d at 292. Nowhere in *Miles*, however, does the court speak of punitive damages. *Miles* involved the recoverability of compensatory damages in a wrongful death suit and should, therefore, be limited to its facts and the precise legal issues presented. Were this court to

extend *Miles* to bar recovery of punitive damages in a general maritime unseaworthiness claim, it would undertake an unjustified exercise in speculation on whether national policy supports overturning a remedial doctrine existing in admiralty law for centuries. In an unreported decision, Judge Walinski of the Northern District of Ohio, Western Division, rejected the interpretation of *Miles* offered by Judges Cohn and Friedman:

> If the Supreme Court had decided to overrule a considerable body of precedent allowing punitive damages in unseaworthiness claims, it would have done so openly, not *sub silentio*.
>
> *Miles* stands for the proposition that the same measure of compensatory damages applies in a general maritime claim for unseaworthiness as would apply in an action brought under the Jones Act. It does not stand for the proposition that punitive damages are not recoverable in an action for unseaworthiness.

Wright, Case No. 3: 89 CV 7452 at 4 (citations omitted).

The Fifth Circuit, in a case decided prior to *Miles*, directly addressed this issue and declined to apply the Jones Act and FELA to preclude an award of punitive damages based on a general maritime claim of unseaworthiness. *In re Merry Shipping Co., Inc.*, 650 F.2d 622 (5th Cir. Unit B 1981). In *Merry Shipping*, the plaintiff's unseaworthiness claim arose out of the drowning of a seaman as a result of the sinking of the defendant's tugboat "Royal Lady" off the coast of South Carolina. *Id.* at 623. The Court based its holding on the distinctions between claims brought under the federal statutory scheme and those brought under general maritime law:

> It does not follow, however, that if punitive damages are not allowed under the Jones Act, they

> should also not be allowed under general maritime law. *First*, unlike the Jones Act, no statutory restraints bar recovery under general maritime law. This body of law is wholly a product of judicial decisionmaking, fashioned on the basis of tradition and policy. *Second*, courts have long recognized that unlike under the Jones Act and the FELA, nonpecuniary losses are recoverable under general maritime law. *Third*, recovery of punitive damages is restricted to where there is willful and wanton misconduct, reflecting a reckless disregard for the safety of the crew, a much higher standard of culpability than that required for Jones Act liability. As noted earlier, punitive damages have been awarded for such misconduct even though the underlying claim, such as breach of contract, is not based on negligence.
>
> We therefore hold that in this Circuit punitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner.

Id. at 626 (footnoted citations omitted). The Fifth Circuit accordingly remanded the case to the district court to determine whether there were sufficient facts to submit the issue of punitive damages to the jury. *Merry Shipping* also held that punitive damages are recoverable notwithstanding the fact that an unseaworthiness claim is pursued in conjunction with a Jones Act negligence claim: "nonpecuniary losses may be permitted on a general maritime law claim even when it is joined with a claim under the Jones Act." *Id.*

Not only have the circuit courts approved of the common law principle of awarding punitive damages for intentional tortious misconduct, but the United States Supreme Court has as well. In *Pacific Mutual Life Ins. Co.*

v. *Haslip*, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the Supreme Court recently considered a constitutional due process challenge to the propriety of a punitive damages award under common law jurisprudence. Although not an action in admiralty, the Court held that the common law method of assessing punitive damages did not violate due process where meaningful procedural safeguards are employed to protect against an arbitrary or capricious jury award. *Id.*

While acknowledging that it was conceivable that an award of punitive damages could, in a given fact setting, be unfair, the court declared, "[W]e cannot say that the common law method for assessing punitive damages is so inherently unfair as to deny due process." *Id.* at 1043, 113 L.Ed.2d at 19.

The *Pacific Mutual* court quoted with approval the words of Justice Grier in *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 14 L.Ed. 181 (1851):

> It is a well established principle of the common law that . . . in all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment, given to the party injured.

111 S.Ct. at 1042, 113 L.Ed.2d at 18.

Justice Scalia, concurring in *Pacific Mutual*, wrote separately to proclaim the presumptive validity of punitive damages under the common law: "I affirm that no procedure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of law." *Pacific Mutual*, 111 S.Ct. at 1053, 113 L.Ed.2d at 33. Justice Scalia advocated punitive damages in appropriate cases: "[s]ince jury-assessed punitive damages are part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity." 111 S.Ct. at 1054, 113 L.Ed.2d at 34.

Justice Kennedy, retreating somewhat from Justice Scalia's strict historical justification for punitive damages, also concurred.

> Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon prodecures found to be either irrational or unfair.

Id. In Justice Kennedy's view, "jury determination of punitive damages has such a long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary." 111 S.Ct. at 1055, 113 L.Ed.2d at 34.

In support of their conclusion in the *MARDOC* order, Judges Cohn and Friedman also cited the case of *Complaint of Cambria Steamship Co.*, 505 F.2d 517, 532 n.11 (6th Cir. 1974), *cert. denied*, 420 U.S. 975, 95 S.Ct. 1399, 43 L.Ed.2d 655 (1975), which stated in a footnote:

> In an admiralty action it has been held that an individual claimant may not recover punitive damages absent a showing of gross negligence,

> actual malice or criminal indifference. Thus, *where the action is predicated upon unseaworthiness alone, punitive damages are not recoverable.* (emphasis added by Michigan Court).

MARDOC Case Clusters 1, 2, 5 and 6, Case No. 91-70468 (E.D. Mich. 1991). Their reliance upon the footnote in *Cambria* for the proposition that punitive damages are unavailable under the general maritime law of unseaworthiness is misplaced. The footnote in *Cambria* refers to *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972), *cert. denied*, 409 U.S. 982, 93 S.Ct. 318, 34 L.Ed. 2d 246 (1972) and can be taken not only as mere dicta, but also as involving an erroneous leap in logic and a misapplication of the underlying case. The issue in *Cambria* was whether the damages in a wrongful death case should be measured by losses sustained by the beneficiaries or losses sustained by the estate, not whether punitive damages are available under the general maritime law claims of unseaworthiness. Furthermore, *Marine Sulphur Queen* does not indicate that punitive damages are, as a matter of law, unavailable under general maritime claims of unseaworthiness. Indeed, *Marine Sulphur Queen* held that punitive damages *were* allowable, but that "[a] condition precedent to awarding them is a showing by the plaintiffs that the defendant was guilty of gross negligence, or actual malice or criminal indifference *which is the equivalent of reckless and wanton misconduct*." 460 F.2d at 105 (emphasis added). *Marine Sulphur Queen* merely affirmed the denial of punitive damages in that case on evidentiary grounds. The court concluded: "[t]here is no evidence in this case to support a finding of any of these elements." *Id.*

The argument has been raised that punitive damages should not be allowed in an unseaworthiness claim as the prosecution of such a claim does not require a showing of negligence or fault. Merely because the duty to maintain a seaworthy vessel is absolute and no negli-

gence or fault need be shown to obtain a recovery, this does not mean that a showing of fault may not, in any circumstance, be made in support of a claim for punitive damages. To suggest this would be inconsistent with generally accepted principles of tort law that willful or wanton misconduct may support an assessment of punitive damages. *See, e.g., In re Merry Shipping Co., Inc.*, 650 F.2d 622, 625 (5th Cir. Unit B 1981).

The rationale behind the absolute duty to provide a seaworthy vessel has never been more important than it is today. An experienced seaman in the early days of sailing was a good judge of the staunchness and seaworthiness of a vessel. The seaman could readily observe the condition of the masts, rigging, sails and planking, and determine whether the vessel was dangerous or likely to bring him home safely. But with the advent of steam navigation, the ships were suddenly full of complicated and unfamiliar machinery and materials. As a consequence, the typical seaman, lacking in technical knowledge, could no longer judge the seaworthiness of the vessel by mere observation. *The Law of Seamen*, Volume 2, 4th Ed. § 27.1 at 191. With these changing conditions, the shipowner's duty to provide a "seaworthy" vessel has been expanded to encompass more than merely providing a tight and staunch hull. *Id.* at 192. An important reason for the shipowners' duty to provide seamen with a safe working environment is that a seaman cannot quit a vessel at sea or object to circumstances surrounding the work commanded. *Id.* at 192.

This court agrees with the position taken in *In re Merry Shipping Co., Inc.*, that

> Punitive damages should be available when a shipowner has willfully violated the duty to furnish and maintain a seaworthy vessel. The

> shipowner's duty stems from the recognition of "the hazards of marine service which unseaworthiness places on the men who perform it . . . and their helplessness to ward off such perils." Punitive damages would serve to deter and punish owners whose wreckless acts increase these hazards. Of course, whether or not they should be awarded in a particular case is an issue for the trier of fact, whether it be judge or jury.

In re Merry Shipping Co., Inc., at 625 and 626 (footnotes omitted).

This court refuses to dismantle the longstanding availability of punitive damages in general maritime tort claims based on unseaworthiness. The *Miles* decision should not be applied beyond its intended parameters. It is not the function of this court to interpret *Miles* in such a manner as to depart from the manifest progression of the case law and eliminate punitive damages in unseaworthiness claims where a long line of precedent guides otherwise. This court is not willing to bar claims for punitive damages as a matter of law based on the strained interpretations of other courts. I, therefore, remain of the firm belief that punitive damages are available under the general maritime doctrine of unseaworthiness where the evidence supports such an award.

The defendant shipowners in *Moline* believe that they are entitled to a judgment notwithstanding the verdict on the issue of punitive damages. In *Moline*, evidence was introduced which could have led the jury to find that shipowner defendants were aware of the dangers of asbestos, and that they took no ameliorative action to protect the seaman [*sic*] aboard their ships by warning of the dangers or by taking precautions, such as supplying or mandating the use of respiratory masks. The

jury in *Moline* was instructed that it could award punitive damages:

> [i]f you find from a preponderance of the evidence that the asbestos injury . . . was caused by an unseaworthy condition on a vessel of one or more of the defendants, and that you find from a preponderance of the evidence that the unseaworthy condition constituted willful or wanton misconduct reflecting a reckless disregard for the safety of Mr. Moline in that it constituted a willful violation of a duty to maintain a seaworthy vessel.

The jury was also instructed:

> [w]illful misconduct . . . implies an intention or purpose to do wrong. An intentional deviation from a clear duty or from a definite rule of conduct and not a mere error of judgment.
>
> Wanton misconduct is such conduct as manifests a disposition to perversity, such as acts of stubbornness, obstinacy or persistence in opposing that which is right, reasonable, correct or generally accepted as a course to follow in protecting the safety of others, and it must be under such surrounding circumstances and existing conditions that the defendant must be conscious, from his knowledge of such surrounding circumstances and existing conditions that his conduct will in all common probability result in injury.

Jury Charge at 20-22.

The jury in *Moline* assessed punitive damages in the amount of $50,000.00 against each defendant shipowner. A jury is presumed to have observed and followed the instructions of the court, determining each issue in accordance with the applicable instructions. *Husky*

Refining Co. v. *Barnes*, 119 F.2d 715 (9th Cir. 1941). Sufficient evidence appears which could support a jury finding that the defendant shipowners' conduct was willful and wanton or in reckless disregard for the safety of Mr. Moline. The jury's assessment of punitive damages is therefore affirmed, and the defendant shipowners' motion for judgment notwithstanding the verdict as to the punitive damages issue is accordingly denied.

It now appears that the Sixth Circuit will decide whether punitive damages are allowable under the general maritime claim of unseaworthiness. If the Sixth Circuit permits punitive damage claims in such instances, and had I deferred to the ruling of the Michigan judges, phase two of the *Moline* trial would need to be retried. If, on the other hand, the Sixth Circuit rules that punitive damages are impermissible, phase two need not be retried, and only the punitive damage award need be vacated.

B. *Sufficiency of Evidence as to Pacific and Atlantic Steamship Company, Isbrandtsen Lines and West Coast Shipping Company*

Thompson, Hine & Flory also moves that judgments notwithstanding the verdict be entered based on the assertion that no evidence was presented that plaintiff was employed by, worked aboard vessels owned by, or was exposed to asbestos dust or fibers while aboard vessels owned by Pacific and Atlantic Steamship Company, Isbrandtsen Lines or West Coast Shipping Company. These portions of the motion are granted.

An examination of the voluminous trial transcript and exhibits was conducted by the court to verify the assertion. Particular attention was focused on plaintiff's Exhibit "A" which provides United States Coast Guard

discharge certificates for each of the vessels Mr. Moline served aboard. The discharge certificates provide the name of each vessel served upon, the dates of service and, in many but not all cases, the name of the employer, which is presumed to be the shipowner. Examination of the transcript and exhibits reveals that no evidence was presented to the jury linking Pacific and Atlantic Steamship Company, Isbrandtsen Lines or West Coast Shipping Company to vessels aboard which Mr. Moline served.

The memorandum in support of plaintiff's answer to all defendants' motions for judgment notwithstanding the verdict contends that Mr. Moline served aboard the *Elmer A. Sperry*, the *Marcus Daly*, and the *Portland Victory*, and summarily states that those vessels were owned by Pacific and Atlantic Steamship Company, Isbrandtsen Lines and West Coast Steamship Company, respectively. Plaintiff further contends that West Coast Steamship Company is a subsidiary of West Coast Shipping Co.

While the United States Coast Guard discharge certificates confirm that Mr. Moline served aboard the *Elmer A. Sperry* and the *Marcus Daly*, the discharge certificates do not indicate, and the other evidence did not reveal, who employed Mr. Moline or owned those vessels during the relevant periods.

The discharge certificates also verify that Mr. Moline served aboard the *Portland Victory* and further confirm that West Coast Steamship Company was Mr. Moline's employer during the relevant periods. However, the discharge certificates fail to provide evidence, nor was any other evidence presented at trial, indicating that West Coast Steamship Company is a subsidiary of, or is in any way affiliated with, the West Coast Shipping Company.

Fed. R. Civ. P. 50 governs the standards for a judgment notwithstanding the verdict. The standard for the trial court to use in deciding whether to grant a motion for judgment notwithstanding the verdict is quite high. "[A] judgment n.o.v. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence." *Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913, 96 S.Ct. 1113, 47 L.Ed.2d 318 (1976). The standard to be used in Jones Act actions is especially high. In a Jones Act action, a motion for judgment notwithstanding the verdict "should be granted only where there is a complete absence of probative fact to support a verdict of negligence for the plaintiff." *Johnson* v. *Bryant*, 671 F.2d 1276, 1279 (11th Cir. 1982). If there is any evidence on which the jury could base a finding that the defendants were in fact liable, the verdict to that effect should stand.

Although counsel for defendants represented by Thompson, Hine & Flory moved for a directed verdict at the close of evidence, that motion was general in nature and did not specifically address these issues. Rather, the motion for directed verdict was generally made on the behalf of all defendants represented by that firm. Had the specific issues raised here been advanced then, the court would have had the opportunity to rule upon them at that time.

Nevertheless, at trial, plaintiff did not enter into evidence any testimony or documentation linking Pacific Atlantic Steamship Company, Isbrandtsen Lines or West Coast Shipping Company to any of the vessels aboard which Mr. Moline served, and to the asbestos dust which was found to have caused his injury or disease. The complete absence of probative fact to support a verdict of negligence or unseaworthiness against these

three defendants necessitates that this court vacate the judgments entered against Pacific Atlantic Steamship Company, Isbrandtsen Lines and West Coast Shipping Company.

C. *Sufficiency of Evidence as to Other Matters*

Shipowners represented by Thompson, Hine & Flory also argue that: 1) the evidence was insufficient to create a jury question on the issue of proximate cause under the unseaworthiness claim; 2) the evidence was insufficient to create a jury question on shipowners' knowledge of the hazards of asbestos under the Jones Act negligence claim; and 3) the evidence was insufficient to raise a jury question on punitive damages. Those portions of the motion are denied.

There was an abundance of evidence in the *Moline* record from which the jury could draw inferences of negligence, unseaworthiness and willfulness. That evidence included oral testimony, exhibits, drawings and photographs describing the various classes of ships Maurice J. Moline sailed upon, as well as conditions aboard those ships. It is a record that is rich in admissible, relevant information. From this evidence, the jury obtained an understanding of why asbestos products were installed aboard ships and how those products were maintained. Evidence was presented that placed asbestos not only in the bowels of the ships and in the engine rooms, but also in the living quarters of the seamen. The jury learned that even if asbestos products were installed properly and in a safe condition, the natural wear and tear during the ships' service, including the vibrations from sailing in heavy waters, caused the composition of the structure of those products to deteriorate. The ships' crews were frequently required to repair such deterioration while the ships were at sea. While at sea, the ships' crews were also

required to saw, tear off, and otherwise remove asbestos insulation in order to perform standard maintenance upon the electric wires, pipes, boilers and other equipment insulated by asbestos. The evidence showed the jury the dangerous propensities of asbestos. The jury was told that the serious health consequences posed to those who come within close proximity to asbestos have been known for decades, and evidence was presented that the defendant shipowners were, or should have been, aware of those dangers. The jury also heard evidence that the shipowners never warned the seaman [*sic*] of the dangers of asbestos, nor did the shipowners take any precautions to protect the seamen from those dangers by, for instance, supplying protective equipment or requiring the seamen to wear masks against inhaling asbestos fibers. While enough evidence was presented by all parties for reasonable minds to differ on the issues, it is for the jury to decide what weight and credibility should be attached to the testimony of each witness, the records and other evidence.

In determining whether sufficient evidence was presented to raise a material issue of fact for the jury,

> sufficient evidence will be found unless, when viewed in the light of those inferences most favorable to the non-movant, there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable persons could differ.

Monette v. *AM-7-7 Baking Company, Ltd.*, 929 F.2d 276, 280 (6th Cir. 1991). Moreover,

> [C]ourts are not free to reweigh the evidence and set aside the jury verdicts merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. [citations omitted.]

Bruner v. *Dunaway*, 684 F.2d 422, 425 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014 (1983), *quoting Tennant* v. *Peoria & P.U. Ry Co.*, 3421 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944).

In the case of Maurice J. Moline, the jury could rationally and reasonably have come to the conclusion that the shipowners were guilty of both Jones Act negligence and providing unseaworthy vessels which were the proximate cause of the asbestos-related disease or injury suffered by Mr. Moline, and that the shipowners were liable for punitive damages for having failed to provide seaworthy vessels. Because probative evidence on the issues of Jones Act negligence, general maritime law unseaworthiness and punitive damages was presented, this court will not overturn the jury's verdict.

II.

MOTION OF POPE & TALBOT FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR NEW TRIAL

Counsel for defendant shipowner Pope & Talbot filed a motion for judgment notwithstanding the verdict and/or for a new trial. Among Pope & Talbot's arguments are that the court should enter an order vacating judgment based on a lack of personal jurisdiction. Pope & Talbot has provided affidavits, which have not been challenged by plaintiff, that it never operated its vessels on the Great Lakes. Pope & Talbot also maintains that it does not have other minimum contact sufficient to invoke the jurisdiction of this court. Pope & Talbot's motion for an order vacating judgment based on a lack of personal jurisdiction is granted, albeit reluctantly, for the following reasons.

The 2,000 original maritime asbestos actions filed in the Northern District of Ohio included claims that were of questionable jurisdiction as to certain defendants.

Motions were filed by those defendants to dismiss the claims against them for lack of personal jurisdiction. The dismissal of those claims would not have terminated the actions entirely, but would merely have reduced the number of defendants in many cases. The defendants not subject to the jurisdiction of the court were listed in Exhibit A of MARDOC Order No. 41 filed December 29, 1989. Consistent with 28 U.S.C.A. § 1631, the court decided to transfer rather than dismiss those claims. That portion of the code provides that

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed . . . , and the action . . . shall proceed as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred.

The parties were asked to work together to generate lists of claims appropriate for transfer, jurisdictions to which those claims should be transferred, and claims remaining in this jurisdiction. Realizing that such a transfer would splinter the litigation among many jurisdictions, several defendants who had initially raised the jurisdictional question decided to waive the jurisdictional dispute in order to take advantage of the consolidated docket and the efficiencies of the OAL Case Management Plan, which had been designed to reduce overall transactional costs. Pope & Talbot's name never appeared on any of the lists of parties to be transferred.

The reason for this court's reluctance to grant this motion is that Pope & Talbot has apparently tried to avail itself of the benefits afforded to the parties by the

procedural/management structures this court has placed on this massive body of litigation, while at the same time endeavoring to avoid any disadvantages of that same management system.

Counsel for Pope & Talbot has said that the corporation has been named as a party in approximately 163 asbestos-related personal-injury actions now before this court. There is no record of Pope & Talbot having objected to this court's jurisdiction when 1,157 actions were placed into inactive/deferral status including, by counsel's own count, over 130 actions in which Pope & Talbot had been named. When any of the 26 remaining actions to which it is a party proceed to trial, however, Pope & Talbot is quick to reinstate its jurisdictional objections.

Moreover, Pope & Talbot did not raise any jurisdictional concerns when the judgment was entered dismissing and terminating the action of Joseph Carbone, in which Pope & Talbot was a named defendant, after phase one of the consolidated trial of Moline, Carbone, Reeves and Smith. Although counsel for Pope & Talbot did not present the defense of the various defendant shipowners on the phase one issues of medical causation and compensatory damages, counsel was present during the trial and attended various conferences, meetings and hearings conducted before, during and following trial, including several in chambers.

Furthermore, testimony elicited from Mr. Dennis Bunday, Pope & Talbot's corporate representative, in phase two of the trial raised serious concerns as to whether Pope & Talbot has sufficient minimum contacts to invoke the jurisdiction of this court. Mr. Bunday testified that Pope & Talbot currently engages in the manufacture and sale of consumer tissue products, including facial tissue, bath, tissue and disposable diapers. While

Mr. Bunday said those products are not marketed directly to the public, his testimony indicated that Pope & Talbot sells the products to retailers, such as Kmart, who then resell the products to consumers. Mr. Bunday's testimony further revealed that a portion of what Pope & Talbot sells is distributed in the State of Ohio. (Transcript volume 8, pages 526-527).

On several occasions, both prior to and following Mr. Bunday's revealing testimony, the court encouraged the parties to provide it with further briefing on the jurisdictional issue. No additional information was made available to the court.

Plaintiff contends that Pope & Talbot has waived jurisdiction through its own acts of filing answers to pleadings. However, this court encouraged the parties to file answers during the period in which it considered whether to dismiss or transfer claims involved in the jurisdictional dispute, so that the litigation could proceed. The court believes that Pope & Talbot renewed its motion to dismiss, appropriately, at various stages of this mass tort litigation.

Since the parties appear to agree that Pope & Talbot never operated vessels on the Great Lakes, the question becomes whether it has other minimum contacts sufficient to invoke the jurisdiction of this court. The controlling case in this area is *Burger King* v. *Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The court held in that case that:

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties or relations." *International Shoe Co.* v. *Washington*, 326 U.S., at 319, 66 S.Ct., at 160. By requiring that

individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer* v. *Heitner*, 433 U.S. 186, 218, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683 (1977) (STEVENS, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984).

Burger King, 471 U.S. at 471-473, 105 S.Ct. at 2181-2182, 85 L.Ed.2d at 540-541.

While there remains some question as to whether Pope & Talbot purposefully directed any of its activities at residents of this forum though its distribution of paper products, it certainly cannot be said that this litigation arises out of or relates to those activities. The claims raised against Pope & Talbot in this action relate to Mr. Moline's service in 1950 and 1951 aboard its vessel the P&T Trader. Pope & Talbot subsequently exited the shipping industry in the early 1960s. The

incidental distribution of paper products in this forum 30 to 40 years after the alleged injury does not warrant the invocation of personal jurisdiction. Therefore, the judgment entered against Pope & Talbot is vacated, and the claims against Pope & Talbot are dismissed and terminated.

III.
INDEMNIFICATION AND CONTRIBUTION

The remaining issues to be decided in *Moline* concern whether defendant shipowners have a right to indemnification or contribution from the third parties. In claiming they have a right to indemnification or contribution, the defendant shipowners rely on indemnification principles enunciated in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed.2d 133 (1956) and *Vaughn* v. *Marine Transport Lines, Inc.*, 723 F. Supp. 1126, 1129 (D. Md. 1989), *aff'd in part, rev'd in part*, and *remanded sub nom., Vaughn* v. *Farrell Lines, Inc.*, No. 89-2221 (4th Cir. Jun. 20, 1991).

The holding in *Ryan* was premised on the requirement that there be a contractual relationship between the participants. The Court in *Ryan* did ". . . not meet the question of a non-contractual type of indemnity . . ." 350 U.S. at 133. Because these actions do not involve a contractual relationship like that in *Ryan*, the *Ryan* indemnity doctrine does not apply here.

As the MARDOC plaintiffs brought actions against shipowners under claims of unseaworthiness and the Jones Act, both of which are based in admiralty, the non-contractual indemnity claims arising therefrom are similarly determined under admiralty law. *See Vaughn*, Slip Op. at 2; *White* v. *Johns-Manville Corp.*, 662 F.2d 243, 247 (4th Cir. 1981); *Tri-State Oil Tools Industries, Inc.* v. *Delta Marine Drilling Co.*, 410 F.2d 178, 186 (5th Cir. 1969).

This court has entertained argument on this subject more than once, and was encouraged by counsel for defendant shipowner Sea-Land Services, Inc. to defer ruling on the matter pending the fourth circuit's ruling in *Vaughn*. In *Vaughn*, a seaman brought an action against shipowners under the Jones Act and the general maritime claims of unseaworthiness, alleging that he had contracted mesothelioma from asbestos used aboard ships. The shipowners brought in manufacturers of asbestos products and boilers containing asbestos insulation as third parties. Plaintiff settled with the shipowners and all third party defendants with the exception of Foster Wheeler. In the subsequent non-jury trial, shipowners whose vessels were equipped with Foster Wheeler boilers claimed indemnity against Foster Wheeler for the full amount they paid in settlement. The district court found that the presence of asbestos insulation in the boilers caused the vessels to be unseaworthy, and further found that Foster Wheeler had not proven its claims of wrongdoing against the shipowners. Foster Wheeler appealed.

The fourth circuit affirmed the district court's application of *Vaughn* of an active/passive theory of indemnity. Typically, the active-passive theory

> arises when the indemnitee has been held absolutely liable for the wrongful act of another as in an "admiralty context where a shipowner held liable on an unseaworthiness claim is awarded indemnity against a third party whose negligence caused the unsafe condition resulting in injury to a seaman." *White*, 662 F.2d at 249; see also *Simpson Timber Co.* v. *Parks*, 390 F.2d 353 (9th Cir.), *cert. denied*, 393 U.S. 858 (1968).

Vaughn, Slip Op. at 3. Accordingly, the fourth circuit held that

> . . . because Foster Wheeler was an active wrongdoer in supplying defective boilers to the shipowners, and the shipowners were found not to have been guilty of wrongdoing themselves, the indemnity theory of active versus passive wrongdoing was properly used to place the ultimate burden on Foster Wheeler, the party whose wrongdoing actually occasioned the loss.

Id.

Although *Ryan* contractual indemnification is specifically not applicable in these MARDOC cases, the same principles of indemnification apply. As the district court in *Vaughn* stated:

> Although a shipowner's duty to maintain its vessel in a seaworthy condition is non-delegable and may be breached regardless of the shipowner's own fault, where the condition of unseaworthiness has been caused by a third party it is that party who should be made to bear the ultimate responsibility for any damage or injury caused by the vessel's unseaworthiness. This is as equally true in cases where the third party has created the condition of unseaworthiness by manufacturing and/or supplying a defective product for use on a vessel, as it is in cases like *Ryan* where the third party has provided an unworkmanlike service.

Vaughn v. *Marine Transport Lines, Inc.* 723 F. Supp. at 1129; *see also Marathon Pipe Line Co.* v. *Drilling Rig Rowan/Odessa*, 761 F.2d 229 (5th Cir. 1985).

Even though a shipowner's duty to maintain a seaworthy vessel is absolute and exists regardless of its own fault, that is not to say that the vessel must be perfect. Rather, the vessel must be "reasonably suitable for

her intended service." *Mitchell* v. *Trawler Race, Inc.*, 362 U.S. 539, 550, 80 S.Ct. 926, 933, 4 L.Ed.2d 941, 949 (1960). The fact that the shipowner must provide a safe place to work that "could not be delegated so as to relieve it from liability to the plaintiff does not make [the shipowner and the manufacturer] joint tortfeasors or free [the manufacturer] from liability as indemnitor." *Simpson Timber Co.* v. *Parks*, 390 F.2d 353, 356-357 (9th Cir. 1968), *cert. denied*, 393 U.S. 858, 89 S.Ct. 126, 21 L.Ed.2d 127 (1968); *quoting Burris* v. *American Chicle Co.*, 120 F.2d 218, 222 (2d Cir. 1941). If defendant shipowners' vessels are deemed unseaworthy solely as a result of the presence of asbestos insulation caused to be placed aboard the vessels by third parties, and said shipowners are therefore found liable, without fault, to plaintiff seamen, the defendant shipowners are entitled to indemnification from those third parties.

The shipowners in MARDOC, in their third party actions for indemnification, seek to transfer the ultimate liability to the third parties on the theory that the third parties were guilty of active or primary wrongdoing while they were innocent, or only passively or secondarily liable. This general theory of indemnity is recognized in admiralty. *Vaughn* Slip Op. at 2; *White*, 662 F.2d at 249. Thus, if the shipowners' vessels become unseaworthy as a result of asbestos caused to be placed aboard ship by a third party, and said shipowners become liable to seamen as a result thereof, the shipowners are entitled to indemnification from the third party, provided, however, that the shipowners themselves are not guilty of primary or active wrongdoing. *Vaughn*, Slip Op. at 3; *White*, 662 F.2d at 249.

This court fully embraces the active/passive doctrine adopted in *Vaughn*. This general theory of indemnity applies restitutionary principles to situations where one

person discharges liability imposed on him by operation of law, but which, because of another party's primary or active fault, should have been discharged by the other party.

A. *Motions of Third Parties to Dismiss Cross-Claims*

Third Party General Electric Co. has filed a motion to dismiss the cross-claims of defendant shipowners seeking contribution/indemnification in *Moline*. Other product manufacturers such as Combustion Engineering, Foster Wheeler Corporation, Westinghouse Electric Corporation, T&N PLC and Owens-Corning Fiberglas have adopted or supplemented General Electric's motion to dismiss cross-claims in response to the cross-claims made against them.

General Electric and the other third parties contend that a jury verdict assessing punitive damages for intentional misconduct by the shipowners bars their claims for contribution, and further argue that having been found guilty of active negligence and willful, wanton, and reckless misconduct, the shipowners are not entitled to indemnity.

In the *Moline* trial, the Court, in its charge to the jury, stated that an award of punitive damages may be had where the jury finds, by a preponderance of the evidence, that asbestos injury of Maurice Moline was caused by an unseaworthy condition on a vessel of one or more of the defendants, and that the unseaworthy condition constituted willful or wanton misconduct reflecting a reckless disregard for the safety of Mr. Moline in that it constituted a willful violation of a duty to maintain a seaworthy vessel. A jury is presumed to have observed and followed the instructions of the court, determining each case in accordance with the applicable instructions. *Husky Refining Co.* v. *Barnes*, 119 F.2d 715 (9th Cir. 1941).

Defendant shipowners were found guilty, by a preponderance of the evidence, of active negligence under the Jones Act, and willful and wanton misconduct with a reckless disregard for Mr. Moline's safety under the general maritime law of unseaworthiness. Because the finding of willful and wanton misconduct is the equivalent of a finding of intentional wrongdoing, defendant shipowners are not entitled to a right of contribution from General Electric and the other third parties. *See, e.g., Bresland* v. *Ideal Roller & Graphics Co.*, 150 Ill. App. 3d 445, 501 N.E. 2d 830 (1986); *Cage* v. *New York Central R. Co.*, 276 F. Supp. 778 (W.D. Pa. 1967), *aff'd*, 386 F.2d 998 (3d Cir. 1967); *Anderson* v. *Local U. No. 3, Intern. Broth. of Elec.*, 582 F. Supp. 627, 632-633 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 546 (2d Cir. 1984).

Furthermore, because of the jury's finding that the defendant shipowners were guilty of active negligence under the Jones Act and willful, wanton, and reckless misconduct in maintaining an unseaworthy vessel under the general maritime law of unseaworthiness, the defendant shipowners are not entitled to immunity. *See Vaughn*, Slip Op. at 3; *White*, 662 F.2d at 249. Accordingly, the cross-claims of the defendant shipowners for indemnification and contribution are dismissed and phase three of the *Moline* trial will not be necessary.

B. *Motion of Babcock & Wilcox to Dismiss*

The question remains, whether the general theory permitting indemnification applies when the party from whom indemnification is sought has already negotiated a settlement directly with the plaintiff. Resolution of that significant issue has the potential to either strongly encourage or discourage settlement negotiations throughout this body of litigation.

In 1989, third party Babcock & Wilcox Company entered into settlement agreements with all of the plaintiffs in the MARDOC litigation, including Mr. Moline. Subsequently, Babcock & Wilcox moved for an order dismissing all third party complaints filed against Babcock & Wilcox in the MARDOC litigation pursuant to Fed. R. Civ. P. 12(B) and 14(A) based upon those settlements. That motion has been opposed by defendant shipowners and other third parties.

The *Restatement (Second) of Torts* § 886A comment m (1979) advances three possible approaches for determining the relative liability among settling and non-settling joint tortfeasors, and comments on the deficiencies inherent in each. The three approaches are:

1) The money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation. This has been called the fairest solution, but it has proved to be very discouraging to settlements. A tortfeasor (and his insurance company) has no incentive to make an individual settlement if he is not at all sure that it will extinguish his liability and allow him to close his books on the subject. This works most decidedly to the detriment of the settling tortfeasor, and the insurance companies have been strongly opposed to it.

2) The money paid extinguishes both any claims on the part of the injured party and any claim for contribution by another tortfeasor who

has paid more than his equitable share of the obligation and seeks contribution. This solution favors the settling tortfeasor and his insurance company and is supported by them. But it can be very unfair to the other tortfeasors and provides a clear incentive to collusion between the settling parties. To avert this it may be necessary to impose a requirement of "good faith." But once there is an attempt to provide objective criteria for determining whether a transaction is in good faith, the finality of the release comes into question, books cannot be closed and the major advantage of the solution is dissipated.

3) The money paid extinguishes any claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the equitable share of the obligation of the released tortfeasor. This solution works most strongly against the interest of the injured party and may have the effect of discouraging him from entering into a settlement. It may, for example, make it not desirable for him to accept the full amount of coverage in a minimum insurance policy if the equitable share of the obligation of the tortfeasor is likely to be substantially larger.

While this court is not unmindful that *Vaughn* rejected the second approach offered by the Restatement, albeit in dicta after its rulings had made the issue before it moot, I believe that further consideration is warranted. Strong policy considerations favor the encouragement of settlement in a mass body of tort litigations such as MARDOC, where thousands of plaintiffs have filed suit

against hundreds of defendant shipowners, who have in turn brought in scores of manufacturers of asbestos and asbestos related products. The potential savings in transactional costs to the parties alone, which are not insubstantial given the precarious economic viability of many of the companies involved, favor the encouragement of settlement. Reasonable and fair settlements not only reduce transactional costs but also allow the parties to maintain control over the risks involved in the litigation. Any method that results in the efficient and fair resolution of cases also reduces the strain on the judiciary and permits other actions, civil and criminal, to proceed in a more timely manner. The harsh realities of third party practice in the MARDOC litigation demand that further consideration be given to the second approach offered by the Restatement.

Third party practice is governed by Fed. R. Civ. P. 14. Under Rule 14(a) a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the defendant/third party plaintiff. Under Rule 14(c), when a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third party plaintiff, may bring in a third party defendant who may be wholly or partly liable, either to the plaintiff or to the defendant/third party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

Circumstances can arise under both Rule 14(a) and Rule 14(c) where a third party defendant is faced with more than a mere claim over. A third party defendant may be found directly liable to plaintiff for all damages

incurred under either rule. Under Rule 14(a), the plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the defendant/third party plaintiff, and the third party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and crossclaims as provided in Rule 13. Under Rule 14(c), the defendant/third party plaintiff may also demand judgment against the third party defendant in favor of the plaintiff, in which event the third party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third party plaintiff in the manner provided in Rule 12, and the action shall proceed as if the plaintiff had commenced it against the third party defendant as well as the defendant/third party plaintiff.

If a third party defendant may ultimately be found liable for the entirety of any damages awarded plaintiff, this court believes that the third party ought to have the opportunity to engage in reasonable, arms-length settlement negotiations directly with plaintiff. Otherwise, the third party defendant remains in the case solely at the mercy of the defendant/third party plaintiff, who may or may not wish to advance settlement discussions with plaintiff. This court therefore adopts the second approach offered by the Restatement and holds that third party defendants may obtain discharges free and clear of any further claims related to this litigation upon negotiating fair and reasonable settlements directly with plaintiff, so long as that settlement passes judicial muster.

Judicial review is critical before a settlement between a plaintiff and a third party defendant can be permitted to bar a defendant/third party plaintff's claims for contribution or indemnification. Without such review,

opportunities for collusion between the plaintiff and the third party defendant exist. For instance, plaintiff could use a settlement obtained from one party, which bore no correspondence to that party's potential liability, to finance the litigation against others. In order to deny the consequences of such sweet-hart deals, it is essential that there be a judicial determination that the settlement was fair, reasonable and achieved at arms-length. If the settlement can survive such scrutiny, claims seeking contribution or indemnity from the settling party should be barred. The amount of such settlement would thereafter be deducted from any verdicts awarded plaintiff against the remaining parties, jointly and severally.

Having embraced the second approach offered by the Restatement, this court finds that the Babcock & Wilcox settlements bar all further claims for contribution or indemnification against it in this litigation subject to determination that the settlements were entered into in good faith.

Copies of the generic releases and the amounts of the settlements between MARDOC plaintiffs and Babcock & Wilcox have been made available to this court for *in camera* inspection. The amounts and details of those settlements will be made available to the other parties in this litigation on September 4, 1991. A hearing shall be conducted in which the parties shall have the opportunity to comment on the fairness and reasonableness of those settlements on September 18, 1991 at 10:30 a.m. The court shall rule on Babcock & Wilcox's motion after reflecting upon those comments.

IV.
CONCLUSION

The controlling issues involved in the MARDOC litigation are maturing. This order has served to outline

some of that progress. I have stated the rationale for my view that punitive damages are available under general maritime claims of unseaworthiness. I have also adopted the active/passive theory of indemnity advocated in *Vaughn* and I have embraced the *Restatement (Second) of Torts* § 886A second approach for determining the relative liability among settling and non-settling joint tortfeasors. I have also found that Babcock & Wilcox's settlements bar all further claims for contribution/indemnification against it in this litigation subject to a determination that the settlements were entered into in good faith, and I have scheduled a good faith hearing on those settlements for September 18, 1991 at 10:30 a.m.

In regard to the case of Maurice J. Moline (C86-821), I have also:

1) denied the defendant shipowners' motion for judgment notwithstanding the verdict on the issue of the availability of punitive damages in a seaman's unseaworthiness claim;

2) granted the motions of Pacific and Atlantic Steamship Company, Isbrandtsen Lines and West Coast Shipping Company for judgments notwithstanding the verdict based on the grounds that there was no evidence that plaintiff was employed by, worked aboard vessels owned by, or was exposed to asbestos dust or fibers while aboard vessels owned by those defendants;

3) denied the motions of defendant shipowners represented by Thompson, Hine & Flory for entry of judgment notwithstanding the verdict on the grounds that a) the evidence of unseaworthiness was insufficient to create a jury question on the issue of proximate cause; b) the evidence of neg-

ligence was insufficient to create a jury question on shipowners' knowledge of the hazards of asbestos; and c) the evidence was insufficient to raise a jury question on willful and wanton misconduct by any shipowner;

4) granted the motion of Pope & Talbot for judgment notwithstanding the verdict based upon a lack of personal jurisdiction;

5) granted the motions of third parties, General Electric Co., Combustion Engineering, Foster Wheeler Corporation, Westinghouse Electric Corporation, T&N PLC and Owens-Corning Fiberglas and all other third parties who have moved to dismiss cross-claims and third party claims for contribution/indemnity filed against them by the remaining defendant shipowners in *Moline* on the grounds that the jury verdict assessing punitive damages for intentional misconduct bars the shipowners' claims for contribution, and that having been found guilty of active negligence and willful, wanton, and reckless misconduct, the shipowners are not entitled to indemnity; and

6) found that Babcock & Wilcox's settlements bar all further claims for contribution or indemnification against it in this litigation subject to a determination that the settlements were entered into in good faith.

Therefore, in the case of Maurice J. Moline (C86-821):

1) the separate judgments entered against defendant shipowners Pacific and Atlantic Steamship Company, Isbrandtsen Lines, West Coast Shipping Company and Pope & Talbot are vacated, and the claims against those defendants are dismissed and terminated;

2) the jury verdict finding that asbestos exposure caused injury or disease to Mr. Moline and setting compensatory damages at $166,000.00 is sustained;

3) the jury verdict finding defendant shipowners: American Mail Lines; American President Lines, Ltd.; Matson Navigation Company, Inc.; Pacific Far East Company; States Lines/States Steamship; States Steamship Company; The Oceanic Steamship Company; and West Coast Steamship Company, guilty of Jones Act negligence and of providing unseaworthy vessels under the General Admiralty and Maritime Law, and jointly and severally liable for the compensatory damage award of $166,000.00 is sustained. Additionally, the jury verdict awarding punitive damages under the general maritime law of unseaworthiness against each of those defendants, severally, in the amount of $5[illegible]00.00 each is sustained;

4) all claims of defendant shipowners remaining in this action that seek contribution/indemnity against third party defendants are dismissed and terminated and thus phase three of the trial will not be necessary; and

5) a good faith hearing on Babcock & Wilcox's settlements is scheduled for September 18, 1991 at 10:30 a.m.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Chief Judge, United States District Court

AT CLEVELAND, OHIO
DATED: August 23, 1991

45 U.S.C.A. §51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

46 USCA §688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with right of trial by jury, and in such action all statutes of the United Atates modifying or extending the common-law or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seasman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

* * *

46 USCA §§761 & 762

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for pecuniary loss sustained by the persons whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

FILED
SEP 7 1993
OFFICE OF THE CLERK

No. 93-223

In The

Supreme Court of the United States

October Term, 1993

CREIGHTON E. MILLER, Administrator of the Estate of MAURICE J. MOLINE,

Petitioner,

v.

AMERICAN PRESIDENT LINES, LTD, on its own behalf and as successor in interest to AMERICAN MAIL LINES; MATSON NAVIGATION COMPANY, on its own behalf and as successor in interest to OCEANIC STEAMSHIP COMPANY; PACIFIC ATLANTIC STEAMSHIP COMPANY; ISBRANDTSEN LINES; WEST COAST SHIPPING COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Miles v. Apex Marine Corp.*, 489 U.S. 19 (1990), bar recovery of punitive damages in a seaman's general maritime death action for unseaworthiness, since punitive damages are not available in a death action under the Jones Act or Death on the High Seas Act.

LIST OF PARTIES/RULE 29.1 STATEMENT

Respondent American President Lines, Ltd., on its own behalf and as successor in interest to American Mail Lines, and respondent Matson Navigation Company, Inc., on its own behalf and as successor in interest to The Oceanic Steamship Company, were owners of vessels on which petitioner's decedent, Maurice J. Moline, was employed by respondents as a seaman at various times.

The parent corporation of respondent American President Lines, Ltd. is American President Companies, Ltd. The parent corporation of respondent Matson Navigation Company, Inc. is Alexander & Baldwin, Inc.

Respondents note that three additional corporations are named as respondents in the caption of the petition for certiorari but who have no further interest in this case: Pacific Atlantic Steamship Company, Isbrandtsen Lines, and West Coast Shipping Company. Following trial, the district court granted judgment notwithstanding the verdict to these three parties, and petitioner did not appeal such order to the Sixth Circuit Court of Appeals.

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No. 93-223

In The

Supreme Court of the United States

October Term, 1993

CREIGHTON E. MILLER, Administrator of the Estate of MAURICE J. MOLINE,

Petitioner,

v.

AMERICAN PRESIDENT LINES, LTD, on its own behalf and as successor in interest to AMERICAN MAIL LINES; MATSON NAVIGATION COMPANY, on its own behalf and as successor in interest to OCEANIC STEAMSHIP COMPANY; PACIFIC ATLANTIC STEAMSHIP COMPANY; ISBRANDTSEN LINES; WEST COAST SHIPPING COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents American President Lines, Ltd. and Matson Navigation Company, Inc. respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

STATEMENT OF THE CASE

Maurice J. Moline filed suit in district court under the Jones Act (46 U.S.C. App. § 688) and the general maritime law doctrine of unseaworthiness to recover damages as a result of injuries allegedly caused by exposure to asbestos while he served as a seaman aboard numerous merchant vessels over a career encompassing 25 years. Named as defendants were thirteen shipowners who employed him from time to time as a seaman aboard their vessels. Following Moline's death, an administrator was substituted as plaintiff, and the complaint was amended to include wrongful death and survival claims.

In a two-phase trial, the jury found that Moline sustained an asbestos related-disease and awarded a sum of compensatory damages. A separate jury later found all defendants liable on grounds of negligence and unseaworthiness and awarded punitive damages in the amount of $50,000 against each shipowner in connection with the claim for unseaworthiness.

On appeal to the Sixth Circuit Court of Appeals, respondents American President Lines, Ltd. and Matson Navigation Company, Inc. challenged both the legal and factual grounds for the award of punitive damages. Respondents argued first that, under the rationale of *Miles v. Apex Marine Corp.*, 489 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), punitive damages are unavailable as a matter of law in an action for unseaworthiness because punitive damages are not available under the Jones Act or Death on the High Seas Act. Second, respondents argued that the evidence was insufficient to create a jury question with respect to punitive damages. The court of appeals vacated the award of punitive damages on the

first ground, extending *Miles* to the matter of punitive damages. The court never reached respondents' factual challenge to the award of punitive damages.

SUMMARY OF ARGUMENT

The petition for certiorari was filed well beyond the 90-day period required by this Court's rule and is untimely because the post-judgment document petitioner filed with the court of appeals in fact constituted only a suggestion for rehearing in banc, not a petition for rehearing. Under this Court's Rule 13.4, the suggestion for rehearing in banc did not suspend the 90-day period for filing the petition for certiorari.

The decision below, which applied *Miles v. Apex Marine Corp.* to punitive damages in a general maritime law action for unseaworthiness, does not conflict with decisions of other courts of appeal. No other court of appeals has had occasion to consider the question whether *Miles* applies to punitive damages in unseaworthiness actions. No actual conflict exists with three pre-*Miles* court of appeals decisions which supported the availability of punitive damages in unseaworthiness actions. Such pre-*Miles* cases never reached the issue decided below – whether *Miles* bars punitive damages in unseaworthiness actions, and the rationale underlying such cases has been discredited thoroughly by this Court's intervening decision in *Miles*. Nor is there a conflict between the decision below and the only decision from a state court of last resort on the issue, which also extended *Miles* to bar punitive damages in unseaworthiness actions.

Contrary to petitioner's assertion, there is not widespread disagreement among lower courts regarding *Miles'* applicability to punitive damages. At most, there is minimal disagreement among district courts, the overwhelming majority of which have extended *Miles* to punitive damages. Of course, this Court cannot devote its limited time to resolving minimal disputes among district courts. The issue is not sufficiently unsettled to warrant this Court's attention.

Finally, the court of appeals correctly applied this Court's precedents to the question of punitive damages in an unseaworthiness action. Petitioner's argument that *Miles* cannot be extended to punitive damages lacks substance. A writ of certiorari is unnecessary to review a correct application of this Court's precedent.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Petition is Untimely.

Rule 13.4 of the Rules of the Supreme Court of the United States specifies that the 90-day period for filing a petition for writ of certiorari runs from the date the judgment sought to be reviewed is rendered. Under that rule, a timely filed petition for rehearing suspends the running of the 90-day period until the petition for rehearing is denied, but a suggestion for rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of the rule. Thus, a suggestion for rehearing in banc does not stay the running of the 90-day period for filing the petition for certiorari.

The petition for certiorari was filed on August 6, 1993, some 136 days after the judgment in question was rendered on March 23, 1993. On April 6, 1993, petitioner filed a document denominated as a "Petition for Rehearing and Suggestion for Rehearing En Banc." The relief requested by petitioner was denied by the court below in an "Order" entered on May 10, 1993.[1] Despite the ambiguity regarding the nature of this document raised by its title, petitioner made it quite clear in the document that the relief sought was rehearing in banc. In this document, the only Federal Rule of Appellate Procedure cited by petitioner was Rule 35, pertaining to in banc hearings or rehearings.[2] In the text of the document, petitioner did not ask for a rehearing by the panel which rendered the decision (Rule 40, Federal Rules of Appellate Procedure). Rather, petitioner suggested "that the rehearing be held en banc." (Note 2, *supra*.) In his conclusion, petitioner reemphasized that the relief sought was rehearing in banc,[3]

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[1] Petitioner's typographic reproduction of the Order at p. A-37 of the petition implies by its caption that the order was entitled an "Order Denying Rehearing and Rehearing En Banc." However, such designation does not appear on the order itself, which is designated simply as an "Order." (Order entered May 10, 1993, 6th Cir. Docket Entry of 5/10/93.)

[2] "Plaintiff-appellee petitions this Honorable Court for a rehearing of the panel decision in this cause entered March 23, 1993. In accordance with Rule 35, Fed. R. App. P. and Rule 14 of the rules of this Court, plaintiff suggests that the rehearing be held en banc." (Petition for Rehearing and Suggestion for Rehearing En Banc, 6th Cir. Docket Entry of 4/10/93 at 1.)

[3] "An en banc hearing is warranted here because . . . [reasons stated.] Accordingly, plaintiff urges that, before publication (or later if necessary), the decision be reconsidered by the full court." (Petition for Rehearing and Suggestion for Rehearing En Banc, 6th Cir. Docket Entry of 4/10/93 at 10.)

again omitting any reference to a rehearing by the original panel.

Clearly, the post-judgment document filed by petitioner was in fact a suggestion for rehearing in banc pursuant to Rule 35, Federal Rules of Appellate Procedure. As such, the filing of that document did not suspend the running of the 90-day period for filing the petition for certiorari. The petition for certiorari is untimely and should be denied.

II. The Decision Below Does Not Conflict with Decisions of Other Courts of Appeal or State Courts of Last Resort.

A. No Actual Conflict Among the Circuits

Miles v. Apex Marine Corp., 489 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), established that the recovery in seamen's general maritime wrongful death and survival actions based upon unseaworthiness may not exceed the limits Congress has placed upon seamen's actions under the Jones Act. In the decision below, the court of appeals held that the reasoning of *Miles* compelled the conclusion that punitive damages are unavailable in a general maritime law unseaworthiness action for the death of a seaman.

The decision below does not conflict with any post-*Miles* decisions of other courts of appeal. In fact, the case below is the first, and to date the only, decision by a United States court of appeals to address the application of *Miles* to the question of whether punitive damages are

available in an action for unseaworthiness.[4] The post-*Miles* decisions of the courts of appeal are not in conflict and do not justify the issuance of a writ of certiorari.

As support for his contention that there is a conflict among the circuits, petitioner relies upon several court of appeals cases decided prior to *Miles* which he claims uphold the imposition of punitive damages in unseaworthiness actions under the general maritime law.[5] However, for several reasons, none of petitioner's pre-*Miles* cases presents an actual conflict with the decision below. First, none of petitioner's pre-*Miles* cases address the issue decided by the court below, namely, that *Miles* requires a seaman's recovery in a judicially-created general maritime law unseaworthiness action be

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[4] In a pre-*Miles* decision, the Ninth Circuit held that *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), precluded recovery of punitive damages in an unseaworthiness action for death of a seaman. *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), *cert. denied*, 493 U.S. 871 (1989). The *Bergen* court's extension of *Higginbotham* to punitive damages in general maritime law unseaworthiness actions is consistent with the Sixth Circuit's extension of *Miles* below to such actions. As this Court noted in *Miles*, "The logic of *Higginbotham* controls our decision here." *Miles*, 111 S.Ct. at 325.

[5] *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981); *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989), *aff'd on other grounds sub nom. Miles v. Apex Marine Corp.*, 489 U.S. 19 (1990); *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987); *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970); *Complaint of Cambria S.S. Co.*, 505 F.2d 517 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975).

kept strictly within the limits imposed by Congress for a seaman's action under the Jones Act. Second, to the extent petitioner's pre-*Miles* cases support the imposition of punitive damages in unseaworthiness actions, the reasoning and authority of such cases have been discredited thoroughly by the intervening *Miles* decision of this Court. Third, several of the cases relied upon by petitioner were decided on other grounds and did not hold that punitive damages should be available in unseaworthiness actions.

(1) Petitioner's Pre-*Miles* Cases Do Not Reach the Issue Decided by the Court Below

In the decision below, the court of appeals reviewed in great detail the analysis employed by this Court in *Miles*, which began with an evaluation of the historical development of the judicially-created *Moragne*[6] maritime wrongful death action. The details of this new cause of action, including the damages recoverable, were to be worked out through future litigation, with federal wrongful death statutes to play an important role in this development. 989 F.2d at 1456.

The court of appeals below continued by noting that in *Miles*, this Court addressed the availability of certain nonpecuniary damages under the general maritime law by looking to the federal maritime death statutes for guidance, of which the Jones Act and DOHSA were of primary importance in the case of a seaman. 989 F.2d at

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[6] *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

1457. The court further observed that in *Miles*, this Court was especially sensitive to the limits set by Congress in the maritime death statutes, and had held that the recovery under the judicially-created general maritime death action, and any general maritime survival action, must be kept strictly within the limits imposed by Congress in the Jones Act and DOHSA. 989 F.2d at 1457.

The court of appeals then applied the *Miles* analysis to the question of punitive damages in a seaman's general maritime death action for unseaworthiness. As directed by *Miles*, the court looked primarily to the federal maritime wrongful death statutes for guidance. Finding that punitive damages are not available under the Jones Act or DOHSA, both of which limit recovery to pecuniary losses, and noting a general congressional policy disfavoring awards of punitive damages in maritime wrongful death actions, the court of appeals held that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman. 989 F.2d at 1457-1459.

None of the pre-*Miles* cases upon which petitioner bases a purported conflict among the circuits reaches the issue decided by the court below – the limiting effect of maritime death statutes, particularly the Jones Act, upon the availability of punitive damages in a general maritime law unseaworthiness action for the wrongful death of a seaman.

Since petitioner's pre-*Miles* cases do not reach the issue decided below, such cases do not create a conflict among the circuits that would justify issuance of a writ of certiorari.

(2) The Reasoning and Authority of *Merry Shipping* Has Been Discredited By the Intervening *Miles* Decision of This Court, and Any Purported Conflict Between Such Case and the Decision Below Does Not Warrant Issuance of a Writ of Certiorari

The chief case cited by petitioner in support of his argument that punitive damages should be recoverable in an unseaworthiness action is *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981). In that case the court held that punitive damages may be recovered in an unseaworthiness action under general maritime law even if punitive damages are not available under the Jones Act. *Merry Shipping* has been followed without further analysis by several subsequent cases cited by petitioner, *e.g.*, *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987). However, the reasoning that supported the court's holding in *Merry Shipping* has been discredited thoroughly by this Court's intervening opinion in *Miles*.[7]

First, in *Merry Shipping*, the Fifth Circuit reasoned that, "unlike the Jones Act, no statutory restraints bar recovery under general maritime law." *Id.*, 650 F.2d at

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[7] Two district courts within the Fifth Circuit have concluded that, after *Miles*, the Fifth Circuit would not reach the same conclusion that it did in *Merry Shipping* regarding the availability of punitive damages in actions for unseaworthiness. *In re the Matter of Waterman S.S. Corp.*, 780 F. Supp. 1093, 1096 (E.D. La. 1992); *Haltom v. Lykes Bros. S.S. Co., Inc.*, 771 F. Supp. 179, 181 (E.D. Tex. 1991).

626. *Miles* completely repudiated such conclusion. Congress retains superior authority in matters of maritime tort law, and courts may not sanction more expansive remedies in a judicially-created cause of action than Congress has allowed by statute in such cases. *Miles, supra,* 111 S.Ct. at 323, 325-328.

Second, in *Merry Shipping,* the Fifth Circuit stated that "courts have long recognized that unlike under the Jones Act and the FELA, nonpecuniary losses are recoverable under general maritime law." *Id.,* 650 F.2d at 626 (footnote omitted). This conclusion also was rejected in *Miles,* in which this Court held that loss of society, a nonpecuniary loss that is not recoverable under the Jones Act, is not recoverable in a general maritime law action for unseaworthiness.

This Court's intervening decision in *Miles* thoroughly repudiated the reasoning underlying *Merry Shipping.* No court of appeals has held that *Merry Shipping* remains viable precedent after *Miles.* Neither *Merry Shipping* nor its progeny creates a conflict with the decision below sufficient to warrant issuance of a writ of certiorari.

(3) Several of the Purportedly Conflicting Cases Were Decided on Other Grounds and Did Not Hold That Punitive Damages Should Be Available in Unseaworthiness Actions

Several of the pre-*Miles* cases petitioner cites as being in conflict with the decision below do not even hold that punitive damages should be available in unseaworthiness actions. Rather, such cases were decided on other

grounds without reaching the question of whether punitive damages are available in such actions. Such cases thus do not conflict with the decision below.

In *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972), the court affirmed the denial of punitive damages for deaths of seamen on the basis of a lack of evidence sufficient to support any elements of a traditional punitive damage analysis. The court had no occasion to consider whether punitive damages are allowable in an action for unseaworthiness, nor to consider the effect of the Jones Act limitation on recovery to pecuniary losses. The case of *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989), *aff'd on other grounds sub nom. Miles v. Apex Marine Corp.*, 489 U.S. 19 (1990), also affirmed the denial of punitive damages because of insufficient evidence to create a jury question.

The case of *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), similarly does not reach the legal issue of whether punitive damages are recoverable in an action for unseaworthiness. *Fuhrman* involved stipulated liability without any distinction made between Jones Act or general maritime claims, and punitive damages were denied on the common law principle that a corporation is not responsible for punitive damages based upon the actions of a subordinate employee unless the corporation authorized or ratified those actions. The denial of punitive damages on this ground does not constitute a holding that punitive damages are available in unseaworthiness actions.

Nor does *Complaint of Cambria S.S. Co.*, 505 F.2d 518 (6th Cir. 1974), hold that punitive damages are available

in unseaworthiness actions. The issue under consideration in that case was whether the general maritime law allowed recovery for loss to the estate itself. The discussion of punitive damages in that case at p. 523 n. 11 was *obiter dictum*. More significantly, the court's *dictum* recognized that punitive damages were not recoverable under the doctrine of unseaworthiness, quite the opposite of what petitioner suggests. *See* 505 F.2d at 523 n.11.

Thus, several of the cases which petitioner claims to be in conflict with the decision below do not even stand for the proposition for which they were cited. These cases are not in conflict with the decision below and do not warrant issuance of the writ.

B. No Conflict Between the Decision of the Court of Appeals Below and State Courts of Last Resort

Petitioner suggests that the decision below conflicts with a state court decision, *Mistich v. Pipelines, Inc.*, 609 So.2d 921 (La. App. 1992), *cert. denied sub nom. Brown & Root Inc. v. Mistich*, ___ U.S. ___, 61 U.S.L.W. 3850 (1993). However, a conflict between decisions of a state intermediate appellate court and a federal court of appeals on a matter of federal law does not warrant issuance of a writ of certiorari. *Cf.* Rule 10.1(b), Rules of the Supreme Court of the United States (writ may be granted when a "state court of last resort" has decided a federal question in a way that conflicts with the decision of a United States court of appeals).

Furthermore, the only decision of a state court of last resort to address the application of *Miles* to punitive

damages in unseaworthiness actions (which petitioner failed to cite) decided the issue in the same manner as the decision below. *Penrod Drilling Corp. v. Williams*, No. D-3430, ___ S.W.2d ___, 1993 Tex. LEXIS 74, 36 Tex. Sup. J. 1011 (Tex. Sup. Ct., June 16, 1993) (*Miles* bars recovery of punitive damages in seaman's action for unseaworthiness).

Thus, there is no conflict between the decision below and any state court of last resort. A writ of certiorari is not warranted on the basis of a purported conflict with state decisions.

III. The Issue Decided Below Is Not Sufficiently Unsettled to Warrant This Court's Intervention and Attention.

On the basis of minimal disagreement among district courts in post-*Miles* decisions, Petitioner suggests that the issue of the application of *Miles* to punitive damages in unseaworthiness actions is ripe for resolution by this Court. The issue is not nearly as unsettled as petitioner suggests. The overwhelming majority of district court cases are consistent with the decision below, holding that *Miles* precludes recovery of punitive damages in unseaworthiness actions. More importantly, this Court obviously cannot devote its limited time and resources to resolving disagreements among decisions of district courts.

Ten reported decisions of district courts extend *Miles* to bar punitive damages in unseaworthiness actions, as did the court of appeals in the decision below. *Anderson v. Texaco, Inc.*, 797 F. Supp. 531, 1993 A.M.C. 1319 (E.D. La.

1992); *In the Matter of the Petition of Cleveland Tankers, Inc.*, 791 F. Supp. 679 (E.D. Mich. 1992); *Complaint of Aleutian Enterprise, Ltd.*, 777 F. Supp. 793, 1992 A.M.C. 1415 (W.D. Wash. 1991); *Donaghey v. Ocean Drilling & Exploration Co.*, 1992 A.M.C. 528 (E.D. La. 1991); *Haltom v. Lykes Bros. S.S. Co., Inc.*, 771 F. Supp. 179, 1992 A.M.C. 1334 (E.D. Tex. 1991); *LaVoie v. Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827, 1992 A.M.C. 1493 (D. Hawaii 1992); *In the Matter of the MARDOC Asbestos Case Clusters, etc.*, 768 F. Supp. 595, 1991 A.M.C. 1610 (E.D. Mich. 1991); *Ortega v. Oceantrawl, Inc.*, 822 F. Supp. 621, 1993 A.M.C. 902 (D. Alaska 1992); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991); *In re the Matter of Waterman S.S. Corp.*, 780 F. Supp. 1093, 1992 A.M.C. 1035 (E.D. La. 1992). An additional nine unreported decisions reach the same result.[8]

On the other hand, petitioner cited only one reported district court decision reaching a contrary result, *In re*

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[8] *Brumfield v. Zapata Gulf Marine Corp.*, 1991 U.S. Dist. LEXIS 12329 (E.D. La., Aug. 29, 1991); *Dopson v. Wilrig (U.S.A.), Inc.*, 1993 U.S. Dist. LEXIS 7548 (E.D. La. June 1, 1993); *Horsley v. Mobil Oil Corp.*, 1993 U.S. Dist. LEXIS 9156 (D.Mass. June 29, 1993); *Howard v. Atlantic Pacific Marine Corp.*, 1992 U.S. Dist. LEXIS 2474 (E.D. La., Feb. 28, 1992); *Knighton v. Tidex Marine, Inc.*, 1993 U.S. Dist. LEXIS 1752 (E.D. La., Feb. 16, 1993); *ODECO, Inc. v. Cornish*, 1991 U.S. Dist. LEXIS 10827 (E.D. La., July 22, 1991); *Rowan Companies, Inc. v. Badeaux*, 1991 U.S. Dist. LEXIS 12355 (E.D. La., Aug. 28, 1991); *Ryan v. Transworld Drilling Co.*, 1991 U.S. Dist. LEXIS 19539 (E.D. La., Dec. 20, 1991); *Stouffler v. Apex Towing Co., Inc.*, 1991 U.S. Dist. LEXIS 13636 (E.D. La., Sept. 20, 1991).

Garda Marine, Inc., 1992 A.M.C. 1307 (S.D. Fla. 1991), together with two unreported decisions.[9]

In an effort to create the illusion of greater disparity among the district court decisions, petitioner cited three additional cases that do not even involve unseaworthiness actions by seamen against their employers. *See Hannon v. Waterman S.S. Corp.*, 1991 W.L. 88012 (E.D. La., Dec. 20, 1991) (claim against manufacturer of asbestos products); *Duplantis v. Texaco, Inc.*, 771 F. Supp. 787 (E.D. La. 1991) (suit against non-employer not involving Jones Act or unseaworthiness); *CEH, Inc. v. F/V "Seafarer"*, 148 F.R.D. 469 (D.R.I. 1993) (property damage action). These cases are completely irrelevant to the issue decided by the court of appeals below.

In sum, the decision below does not conflict with post-*Miles* decisions of any other court of appeals or state court of last resort. The decision below also is consistent with the result reached in the overwhelming majority of district court cases to address the issue of the extension of *Miles* to unseaworthiness actions. The issue is not sufficiently unsettled to warrant this Court's intervention and attention.

IV. Review is Unwarranted Because The Decision Below is in Complete Accord With The Precedents of This Court.

In *Miles*, this Court reasoned that when Congress has spoken directly to a question, the courts are not free to

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[9] *Logue v. Tidewater, Inc.*, 1992 W.L. 59409 (E.D. La., Mar. 18, 1992); *Davis v. Penrod Drilling Corp.*, 1991 W.L. 264541 (E.D. La., Dec. 2, 1991).

supplement the statute so thoroughly that the statute becomes meaningless. Where Congress in the Jones Act did not authorize recovery for loss of society in a wrongful death action and did not authorize recovery of decedent's lost future earnings in a survival action, this forecloses more expansive remedies in a general maritime action. *Id.*, 111 S.Ct. at 325-328. This result follows directly from the Court's decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). *Miles, supra*, 111 S.Ct. at 325.

In the decision below, the court of appeals directly applied the foregoing precedents to the question of punitive damages in an unseaworthiness action. Finding that punitive damages are not available under the Jones Act or DOHSA, which limit recovery to pecuniary losses, and noting a general congressional policy disfavoring awards of punitive damages in maritime wrongful death actions, the court of appeals held that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman. 989 F.2d at 1457, 1459.

Unable to avoid the clear and inescapable logic of the court of appeals' application of *Miles* to punitive damages, petitioner suggests that *Miles* cannot be applied to punitive damages because the purpose of punitive damages is different than that of compensatory damages. However, it is irrelevant that the purpose of punitive damages is to punish and deter; the governing factor is that by statute Congress has precluded recovery of such damages in cases involving seamen. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348-1349 (9th Cir. 1987), *cert. denied*, 493 U.S. 871 (1989).

In order to further the argument that *Miles* cannot be extended to punitive damages, petitioner is forced to range far afield from the issue of the preclusive effect of the Jones Act upon punitive damages in a seaman's unseaworthiness action. The weakness of petitioner's position is betrayed by the degree he must depart from the central issue to cobble together his argument.

Petitioner refers to this Court's recent cases upholding punitive damages assessments in the face of due process challenges, *TXO Production Corp. v. Alliance Resources Corp.*, ___ U.S. ___, 61 U.S.L.W. 4766 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). Such cases contain no issue regarding the preclusive effect of a federal maritime statute upon the recovery in a judicially-created cause of action for unseaworthiness. The due process cases have no relevance to the issue at hand.

Petitioner again strays from the arena of unseaworthiness actions by referring to cases involving maintenance and cure. Congress has not regulated the recovery of maintenance and cure, as it has done in connection with seamen's injury and death actions. Additionally, petitioner incorrectly asserts that *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), dealt with the imposition of punitive damages in a seaman's action and that the decision below contravenes *Vaughn*. *Vaughn* dealt with the recovery of attorneys' fees as damages for a shipowner's refusal to pay maintenance and cure. An extension of *Miles* to punitive damages in an unseaworthiness action does no violence to this Court's holding with respect to maintenance and cure in *Vaughn*,

which involved neither punitive damages nor unseaworthiness.

Petitioner relies upon a case involving seamen's actions against a non-shipowner, *Pino v. Protection Maritime Ins. Co.*, 490 F. Supp. 277 (D. Mass. 1980) (claim that insurance company "blacklisted" seamen with prospective employers). Petitioner also relies upon a non-seaman's case involving a product liability action for deaths of naval aviators under DOHSA, *Renner v. Rockwell Int'l Corp.*, 403 F. Supp. 849 (C.D. Cal. 1975).[10] These cases clearly are irrelevant to the preclusive effect of the Jones Act upon the remedies in a seaman's unseaworthiness action.

Petitioner makes two final points in his argument which warrant a response. First, petitioner implies that the decision below did away with more than a century's worth of punitive damages law in unseaworthiness actions. On the contrary, the potential availability of punitive damages in seamen's unseaworthiness actions is a question of quite recent origin, having arisen only within about the last two decades. As late as 1980, a commentator was justified in observing, "It has generally been accepted that punitive damages are not recoverable in an unseaworthiness action." R. Dahlquist, "Punitive Damages Under the Jones Act," 6 The Maritime Lawyer 1, 5 (1980). Additionally, punitive damages never became a

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[10] Petitioner fails to note that *Renner* was vacated and remanded for further consideration in light of *Mobil Oil Corp. v. Higginbotham*, which held that DOHSA's limitation of damages to pecuniary losses forecloses recovery for non-pecuniary loss in a general maritime action; *see* 587 F.2d 1030 (9th Cir. 1978).

well-established remedy in seamen's cases. Respondents are not aware of a single reported federal decision in which punitive damages actually were awarded to a seaman and the award has withstood a challenge on appellate review.

Second, petitioner asserts that the decision below impairs uniformity of maritime law because it bars punitive damages only in actions by seamen while allowing such damages in actions by anyone other than a Jones Act seaman. However, this Court already has recognized that although uniformity is of value in maritime law, a concern for uniformity cannot override the terms of a statute. *Miles*, 111 S.Ct. at 326; *Higginbotham*, 436 U.S. at 624, 98 S.Ct. at 2014. The result reached by the court below was required with respect to seamen by the terms of the Jones Act and the Death on the High Seas Act.

This Court's focus on uniformity has been to establish a "uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law", *Miles*, 111 S.Ct. at 326, not to require uniformity for all maritime actions brought by persons of different legal status. As the court below noted, allowing punitive damages in this case would violate the principle of uniformity for all seamen's actions by creating two major inconsistencies in seamen's law. First, punitive damages would be available for some seamen's deaths occurring in territorial waters but not for deaths occurring on the high seas. Second, punitive damages would be available for seamen's deaths occurring in territorial waters due to unseaworthiness but not for those due to negligence. 989 F.2d at 1457-1458. The court

of appeals wisely avoided reintroducing such inconsistencies in maritime law applicable to seamen.

The court below correctly applied this Court's precedent in *Miles* and correctly concluded that punitive damages are unavailable in an unseaworthiness action under general maritime law because such damages are not available to a seaman under the Jones Act or DOHSA. A writ of certiorari is unwarranted to review a correct application of this Court's precedent.

CONCLUSION

The decision below correctly applies this Court's precedent in *Miles v. Apex Marine Corp.* to bar punitive damages in a seaman's general maritime law action for unseaworthiness. The decision is not in conflict with decisions of other courts of appeal or state courts of last resort. Nor is the issue sufficiently unsettled to warrant this Court's time and attention. Furthermore, the petition is untimely.

For the foregoing reasons, respondents respectfully suggest that the petition for writ of certiorari be denied.

Respectfully submitted,

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